United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

F.P.C. 78

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,887

NIAGARA MOHAWK POWER CORPORATION, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition to Review an Order of the
Federal Power Commission

August 16, 1966

PERRY-SAMUEL PRINTING CO., INC., WASHINGTON, D. C.

INDEX TO JOINT APPENDIX

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JOINT APPENDIX

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(1)

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Excerpts from Transcript of Proceedings of Prehearing Conference

BEFORE THE FEDERAL POWER COMMISSION

In the Matters of:

NIAGARA MOHAWK POWER CORPORATION
Project Nos. 2318, 2320, 2330, 2424

Hearing Room E
Federal Power Commission,
441 G Street, Northwest,
Washington, D. C.,
Tuesday, April 20, 1965.

The above-entitled matter came on for prehearing conference, pursuant to notice, at 10:00 a.m.

BEFORE:

FRANCIS L. HALL, Presiding Examiner.

APPEARANCES:

LAUMAN MARTIN, Vice President and General Counsel, 300 Erie Boulevard W. Syracuse 2, New York, appearing on behalf of Niagara Mohawk Power Corporation.

GEORGE F. BRUDER, Federal Power Commission, Washington, D. C., appearing on behalf of the Staff of the Federal Power Commission.

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PROCEEDINGS

Presiding Examiner: The prehearing conference set for this time and place in the matter of Niagara Mohawk Power Corporation, Project Nos. 2318, 2320, 2330 and 2424, will be in order.

The Federal Power Commission is the Federal agency charged with the responsibility for authorizing the construction, operation and maintenance of hydroelectric projects under Part I of the Federal Power Act. By orders issued in 1963 and 1964, the Commission authorized the issuance of licenses to Niagara Moawk Power Corporation for the four constructed hydroelectric projects involved in this consolidated proceeding. Because these projects had been maintained and operated for many years without the requisite Federal authority, each of the licenses issued for these projects had an effective date prior to the date of issuance of the licensing order. It is the effective date of these licenses that gives rise to the controversy in this proceeding, it being contended by the company that the Commission is without authority to "make retroactive application of annual charges" and, insofar as Project No. 2424 is concerned, amortization reserves.

The statutory provision concerning the term of licenses is contained in Section 6 of the Act, concerning annual charges in Section 10(e), and with respect to amortization

reserves in Section 10(d). There is no provision specifically governing the date of the license, the Commission power in this respect being found in Section 10(g). Cases abound in which the Commission has backdated or otherwise limited the license term or set up amortization based on the effective date of the license.

It will probably be helpful to an understanding of what is involved here if the Examiner points out three dates: (a) the date of the order issuing each of the four licenses; (b) the effective date of each license; and (c) the date each project was placed in operation:

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Project No.	Date of Order Issuing License	Effective Date Of License	Year in Which Project Began Operation
2318	June 25, 1963	April 1, 1949	1930
2320	June 12, 1964	Nov. 1, 1949	1902 (Part) 1925 (Part)
2330	June 15, 1964	Nov. 1, 1949	Between 1904 and 1928
2424	Dec. 9, 1964	July 1, 1941	1942

The licenses, except for the one issued for Project 2424, have been accepted by Niagara Mohawk.

According to the Examiner's understanding, when constructed projects such as the four here involved are brought under license, a base as of the beginning of the license period is established from which all accounting control starts under the Act. Moreover, licensees have an obligation under the terms of their license and under Section 10(e) of

Part I of the Act to pay reasonable annual charges for reimbursing the United States for the costs of the administration of Part I. To the extent relevant here, Section 10(e) provides—

"(e) That the licensee shall pay to the United States reasonable annual charges in the amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part* *, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require* *."

In issuing the licenses for the already constructed projects of Niagara Mohawk Power Corporation the Commission did what it had done many times before. That is to say, it imposed annual charges from and after the effective date of each license. According to the Examiner's understanding, Niagara Mohawk believes that the Commission is in error in assessing annual charges earlier that (1) the date of the order issuing each license, or perhaps, at the earliest (2) the date the application for license was filed. The company appears to be strongly of the view that the effective date of the license should be the same date as the order issuing the license, not a date prior thereto. Accordingly, Niagara Mohawk applied for and was granted a

rehearing as to the annual charges assessed for the periods prior to the dates of the orders issuing the licenses, such charges amounting to $27,883.07 for Project No. 2318, $30,938.85 for Project No. 2320, $115,437.13 for Project No. 2330, and $12,688.55 for Project No. 2424. The rehearing application relating to Project No. 2424 also alleged error respecting (1) the establishment of an amortization reserve pursuant to Section 10(d) of the Act and (2) the rated capacity of the project, as to which rehearing has also been granted.

Apparently the effective date of the license for Project No. 2424 was the date on which construction began, namely, July 1, 1941, rather than the date on which the project was placed in operation—January 29, 1942.

Before calling upon counsel for their views and present position with respect to the matters on which rehearing has been granted, the Examiner will state his general understanding of Part I of the Federal Power Act and will make further reference to the background of this case.

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Part I of the Act vests in the Commission jurisdiction over the licensing, regulation and control of hydroelectric projects subject to Federal jurisdiction. Section 6 thereof limits licenses to not more than fifty years. The Act also reserves to the United States the right of recapture at the end of the license period. Upon expiration of the franchises

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the Government has the option of (1) taking over the license upon payment of the net investment not to exceed fair value, plus reasonable severance damages; (2) renewing the old license; or (3) granting a new one.

Under Part I it is unlawful to construct, operate or maintain any project over which the Commission has jurisdiction except under and in accordance with a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to the Act.

Insofar as the four projects here involved are concerned, they have had neither permit or license. Two were constructed without Federal authorization prior to 1920. The other two, namely, Projects Nos. 2318 and 2424, and additional parts of Project No. 2330, were constructed subsequent to 1920 without a license being applied for under Section 4(e) of the Act, and without a declaration of intention having been filed under Section 23(b). Accordingly, their construction was prohibited by the Act.

With the establishment of the Commission in 1920 it was no longer necessary for Congress to consider each and every proposal separately and enact special legislation in granting the consent of Congress, where appropriate, to construct and operate each individual project. Once the Commission's jusidiction to issue a license is determined, the only questions remaining are whether a license should issue, and,

if so, the conditions under which it should be issued, the intention of the Act being to assure, through the imposition of conditions, the accomplishment of the purposes of the Act.

All licenses are conditioned upon the acceptance by the licensee of all the terms and conditions of the Act and such further conditions as the Commission may prescribe in conformity with the Act. In this connection, and as counsel are aware, Section 6 of the Act makes it clear that the terms of a license is within the sound discretion of the Commission. It provides that each licensee "shall be conditioned upon the acceptance of the licensee of all terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act * * ." Section 10(g) gives the Commission wide latitude and discretion in the performance of its licensing and regulatory functions. It provides that the Commission may prescribe in a license "Such further conditions not inconsistent with the provisions of this Act" as it "may require". Section 309 confers broad powers upon the Commission "to perform any and all acts * * it may find necessary or appropriate to carry out the provisions of this Act." The general powers conferred by Section 309 are for the purpose of enabling the Commission to protect its jurisdiction and enforcing the purposes of the Act.

As already indicated, Niagara Mohawk complains of certain

conditions imposed by the Commission in connection with the licenses issued for its projects here under consideration. It is in the light of Section 6, 10(a), 10(g), 309, and other provisions of the Act that it is to be determined whether authority exists for such conditions. In connection with

the authority conferred under Section 309, which is identical to authority conferred under Section 16 of the Natural Gas Act, the Examiner calls attention to the decision of the Court in Public Service Commission of the State of New York v. Federal Power Commission, 326 F.2d 893, 897, in which it is stated with reference to Section 16 of the Natural Gas Act:

"All authority of the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation. While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail."

On a number of occasions the Commission has been faced, as it is here, with licensing projects previously maintained without the requisite Federal authority. This appears to have caused the Commission to adjust its administrative machinery and actions to the necessity of dealing with such projects

so as to enable their continued operation in compliance with the law. In meeting this responsibility the Commission appears to have considered it reasonable and proper to backdate and fix license terms so as to put those who carry on unregulated project operation in no better position than those who have timely complied therewith, as far as concerns annual charges, the amortization reserve requirement, and other matters.

As the Examiner understands the statements made by counsel for Niagara Mohawk in his petitions for rehearing,

he concedes that when a constructed project is brought under license the Commission may assess annual charges from and after the date of the order issuing a license. He, however, contends that Section 10(e) does not by its terms, or by reasonable inference authorize the Commission to assess annual charges from and after the effective date of the license. He further alleges that assessment of such annual charges constitutes a taking of property without due process of law; that such an assessment is arbitrary and unreasonably discriminatory; and that the licenses issued by the Commission do not by their terms purport to fix annual charges as of the effective date.

Additionally, counsel states that assuming, "arguendo", that administration charges can be lawfully imposed with retroactive effect, the Commission's order is defective in failing to specify the Commission's cost of administration for prior

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years and the necessity, if any, for Niagara Mohawk to make reimbursement."

The general impressions that have been set forth in the Examiner's opening remarks are those that have occurred to the Examiner as a result of reading the Commission's orders, the application for rehearing and the Examiner's general knowledge. Perhaps counsel will be able to stipulate the facts upon which the issue or issues can be decided.

If so, the hearing on the record will be recessed to permit informal discussions among counsel. If the facts can be stipulated, the stipulation will then be made a part of the record and dates fixed for the filing of briefs.

While I at one point indicated that cases abound in which the Commission has backdated or otherwise limited the

license term or set up amortization reserve based on the effective date of the license, there are very few court decisions. The two that I am aware of are Montana Power Corporation v. Federal Power Commission, 330 Fed. 2d, 781, and Metropolitan Edison vs. FPC, 169 Fed. 2d, 719.

In The Montana Power Company case seems to demonstrate that the Commission's power to limit the license term can be as little as seven years. The Metropolitan Edison case seems to provide the guiding principle applicable where construction, operation and maintenance of a project were originally not legally authorized.

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One of the things I have observed in reading the petitions for rehearing is the reference made by counsel for Niagara Mohawk to the Commission's opinion in Public Service Company of New Hampshire, which decision is reported in 27 FPC beginning at 830. The project there involved had been constructed on the Androscoggin River in 1894, with various parts therein being replaced and some added at various times over many years, I think beginning in 1903 and ending in 1959. The Public Service Company of New Hampshire acquired the project in 1943 and applied for license in 1960 after the Commission had found the Androscoggin River to be a navigable water of the United States.

The trouble I have with that case, and what is involved here is that the Commission seems by that decision to take a more lenient view with respect to pre-1935 construction than it does with respect to post-1935 construction. Apparently after the Commission issued that decision, it comes along with the issuance of the four licenses involved in this proceeding and retroactively fixes an effective date in all licenses.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, and David S. Black.

Niagara Mohawk Power Corporation

Project Nos. 2318, 2320
2330, 2424

Order Fixing Consolidated Hearing

(Issued March 4, 1965)

On August 12, 1964, Niagara Mohawk Power Corporation (Corporation), as licensee for constructed Project No. 2318, filed an aplication for rehearing of a statement of annual charges, dated July 17, 1964, for the period of April 1, 1949, through December 31, 1963. On November 10, 1964, the Corporation, as licensee for constructed Project Nos. 2320 and 2330, filed an application for rehearing of a statement of annual charges, dated October 16, 1964, for the period of November 1, 1949, through December 31, 1963. On January 7, 1965, Corporation filed an application for rehearing of the order, dated December 9, 1964, issuing a license for its constructed Project No. 2424. Each of these applications alleges error respecting the asssesment of annual charges for administrative costs under subsection 10(e) of the Federal Power Act (16 U.S.C. 803 (e)), and the application in Project No. 2424 alleges error respecting certain other license conditions. By orders of September 8, 1964, December 4, 1964, and January 29, 1965, the Commission granted the above applications for rehearing.

The Commission finds:

It is desirable and in the public interest to consolidate these proceedings for purposes of hearing.

(14)

The Commission orders:

(A) A prehearing conference will be held on April 19, 1965 at 10 a.m. (EDST) in a hearing room of the Federal Power Commission, 441 G Street, N.W., Washington, D. C. 20426, before the Presiding Examiner.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by the Federal Power Act, particularly Sections 10(a), 10(e), and 308 thereof, and the Commission's Rules of Practice and Procedure, a public hearing shall be held

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in a hearing room of the Federal Power Commission, 441 G Street, N. W., Washington, D. C. 20426, respecting the matters involved and the issues presented. The time for the hearing is to be fixed by the Presiding Examiner following the prehearing conference.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary

* * * * * * * * * *

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Presiding Examiner: As I indicated, I have given you some general impressions that I have obtained from reading the Commission's orders, the applications for rehearing and the Examiner's general knowledge.

If I am in error, I certainly hope that counsel will take the opportunity of pointing out where I am in error. What I am seeking to do is to have everyone concerned talking and acting on the same wave length, or at least having the same understanding.

Appearances for the record will now be entered.

Mr. Martin: Lauman Martin, 300 Erie Boulevard West, Syracuse, New York, on behalf of Niagara Mohawk Power Corporation.

Presiding Examiner: Staff counsel?

Mr. Bruder: George F. Bruder for the Federal Power Commission Staff.

Presiding Examiner: Are there any further appearances? I hear no response.

Mr. Martin, you may proceed with such statement as you care to make with reference to the matters involved in this proceeding.

Mr. Martin: Mr. Examiner, as I heard your very well considered statement, reflecting to me very clearly that you have done a good deal of homework, I rise with some apprehension with respect to two matters, but I would like to take

those up here and now while they are fresh in my mind, and I pose the question: Am I to understand from your comments that you consider the starting date for the determination of the initial 20 years for amortization reserve purposes under Section 10(d) to be an issue in this proceeding, or this consolidated proceeding?

Presiding Examiner: I was going to ask counsel, if they would, to conclude their remarks stating what the issues are. I have simply recited what I gained from reading your applications for rehearing. It may or may not be. I really don't know.

Mr. Martin: May I make it clear, so far as I am concerned, that I don't deem this consolidated proceeding to

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involve the matter of amortization reserve considerations under Section 10(d) beginning (1) when does that period start and (2) what is the status with respect to the application of 10(d) to any one of the four licensed projects. If I am in error in that respect, I would like to be so advised early, because I fully intend to take up that fight at a separate time when some Commission action, present or threatened, brings that into focus.

That is, very frankly, my position on that score.

Presiding Examiner: My recollection is that you referred to that section only in connection with the application for rehearing in Project No. 2424.

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Mr. Martin: Yes, sir. Perhaps I should say if that matter is before the Commission—that is, as an issue in 2424—I am prepared to cope with it, but not as to the other three.

Presiding Examiner: That is my understanding.

Mr. Martin: Very good, sir.

Also in your remarks you made reference to the maximum fifty year period of license, and adverted, for example, to The Montana Power case where a seven-year term was apparently upheld by the courts.

It is not my understanding, on behalf of Niagara Mohawk Power Corporation that no question is raised in any one of the four license proceedings with respect to the termination date of each of the licenses, three accepted and one the subject of rehearing.

Presiding Examiner: But only with respect to the beginning date or, shall I say, the effective date.

Mr. Martin: Yes, so if you will agree for discussion that the beginning date is 1963 or '64, I am not objecting to the fact that there is less than fifty years from such a date.

Presiding Examiner: Very well.

Mr. Martin: I want to make that clear. I think that takes away some of the possible lack of understanding.

Presiding Examiner: No, I think my understanding was the same as yours, but it is good that I state it so there cannot be any question now as to what the situation is at least

in your mind and in the Examiner's mind.

Mr. Martin: Now I have a matter that gives me some mild concern which was not a matter of discussion by you, Mr. Examiner, nor is it, per se, reflected in the Commission's orders arising from the Petition for Rehearing in the first three accepted licensed projects. In each case, I think you will recall that the licensee requested specifically that imposition of penalty charges be waived to and including final determination of this application.

While I have not thought that the proceeding will be determined adversely to my contentions, I would like to be assured that failure to pay—with this request pending, which is in accordance with the specific rule of the Commission—will not result in penalty applications when the proceeding is determined should it be adverse to Niagara Mohawk.

Presiding Examiner: That is for the Commission to determine. I don't understand why it would.

Mr. Martin: My concern arose entirely from silence.

Presiding Examiner: There are probably one or two other matters that you raised, but I didn't consider them as of sufficient significance to mention them in my statement.

Mr. Martin: Very good, sir.

You, as I understand it, have already included in this record the orders authorizing the licenses.

Presiding Examiner: I thought that might be desirable.

Mr. Martin: Yes, sir.

I would like to augment that offer by having included in the record the three statements of annual charges for the three already licensed projects to which you referred by total amounts.

Presiding Examiner: Is there any objection?

Mr. Bruder: No objection.

Presiding Examiner: Without objection, those three statements will be copied into the record at this point.

(The three statements referred to read as follows:)

FEDERAL POWER COMMISSION
Washington 25, D. C.

July 17, 1964

Statement of Annual Charges for the Period April 1, 1949 Through December 31, 1963

Licensee: Niagara Mohawk Power Corporation
Address: 300 Erie Boulevard West
Syracuse, New York 13202

Contract No.
1463

Project No. 2318 License effective April 1, 1949

State New York

Power capacity (h.p.) Installation (h.p.) 27,000
Acres: Project area Public land area Ratio
Kilowatt-hours generated from April 1, 1949 through December 31, 1963 955,985,800
miles of transmission line on 100-foot right-of-way (or equivalent).

Item 1. ADMINISTRATIVE CHARGE

$ per annum		$
Operation charge on	hp. at ¢ per hp. for 14.753425 years	
Capacity charge on 27,000	hp. at 1¢ per hp.	3,983.42
Energy charge on 955,985,800 kwhs. at 2½¢ per 1000		23,899.65

Item 2. CHARGE FOR USE OF GOVERMENT LANDS:

(a) Exclusive of transmission line—
10¢ x (ratio) x (hp.)
$ per annum

(b) For transmission line—
miles at $5 per mile
$ per annum

Total due the United States $27,883.07

D. L. PEARSON
Acting Chief, Budget and Financial Services

FEDERAL POWER COMMISSION
WASHINGTON, D. C. 20426

STATEMENT OF ANNUAL CHARGES

(For period beginning November 1, 19 49, ending December 31, 19 63)

INSTRUCTIONS - Licensee will return duplicate copy of this form with remittance to the Federal Power Commission within the prescribed time limits indicated on the reverse side of the original copy. Duplicate copy will be receipted and returned to Licensee. Please remit Check or Money Order to the Federal Power Commission, made payable to the Treasurer of the United States.

NAME AND ADDRESS OF LICENSEE

Niagara Mohawk Power Corporation
300 Erie Boulevard West
Syracuse, New York 13202

DATE OF STATEMENT: 10/16/64
CONTRACT NUMBER: 1470
PROJECT NUMBER: 2320
LICENSE EFFECTIVE: November 1, 1949
STATE: New York

POWER CAPACITY (hp)	INSTALLATION (hp)	ACRES: PROJECT AREA	PUBLIC LAND AREA	RATIO
	61,300			

KILOWATT-HOURS GENERATED IN PERIOD COVERED BY THIS STATEMENT: 4,270,107,000

MILES OF TRANSMISSION LINE ON 100 FT. RIGHT-OF-WAY (Or equivalent):

ITEM I - ADMINISTRATIVE CHARGES			AMOUNT DUE
1. Administrative Charge	$ _____	Per Annum _____	$
2. Operation Charge on	_____	hp. at _____ ¢ per hp. for 14.167123 yrs.	
3. Capacity Charge on	61,300	hp. at 1 ¢ per hp.	8,684.45
4. Energy Charge on	4,270,107,000	Kwhs at 2½ ¢ per 1000	106,752.68

ITEM II - CHARGES FOR USE OF GOVERNMENT LANDS		
A. EXCLUSIVE OF TRANSMISSION LINE -		$
1. Ten cents (10c) X _____ (Ratio) X _____ (hp)		
2. Per Annum Charge		
B. FOR TRANSMISSION LINE -		
1. Total Transmission Miles _____ at $5.00 per mile		
2. Per Annum Charge		
TOTAL CHARGES DUE →		$115,437.13

TITLE: Budget and Financial Services

SIGNATURE: D. F. Ferrara

FPC Form 183A
Rev. 10-63

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STATEMENT OF ANNUAL CHARGES

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(The period beginning November 1, 1949, ending December 31, 1963)

INSTRUCTIONS - Licensee will return duplicate copy of this form with remittance to the Federal Power Commission within the prescribed time limits indicated on the reverse side of the original copy. Duplicate copy will be receipted and returned to Licensee. Please remit Check or Money Order to the Federal Power Commission, made payable to the Treasurer of the United States.

NAME AND ADDRESS OF LICENSEE

Niagara Mohawk Power Corporation
300 Erie Boulevard West
Syracuse, New York 13202

DATE OF STATEMENT: 10/16/64
CONTRACT NUMBER: 1471
PROJECT NUMBER: 2330
LICENSE EFFECTIVE: November 1, 1949
STATE: New York

POWER CAPACITY (hp)	INSTALLATION (hp)	ACRES PROJECT AREA	PUBLIC LAND AREA	RATIO
	15,300			

KILOWATT-HOURS GENERATED IN PERIOD COVERED BY THIS STATEMENT	MILES OF TRANSMISSION LINE ON 100 FT. RIGHT-OF-WAY (OR EQUIVALENT)
1,150,851,000	

ITEM I - ADMINISTRATIVE CHARGES				AMOUNT DUE
1. Administrative Charge	$		Per Annum	$
2. Operation Charge on		hp. at	¢ per hp. for 14.167123	yrs.
3. Capacity Charge on	15,300	hp. at	1 ¢ per hp.	2,167.57
4. Energy Charge on	1,150,851,000	Kwhs at	2½ ¢ per 1000	28,771.28

ITEM II - CHARGES FOR USE OF GOVERNMENT LANDS				AMOUNT DUE
A. EXCLUSIVE OF TRANSMISSION LINE -				$
1. Ten cents (10¢) X		(Ratio) X	(hp)	
2. Per Annum Charge				
B. FOR TRANSMISSION LINE -				
1. Total Transmission Miles		at $5.00 per mile		
2. Per Annum Charge				
			TOTAL CHARGES DUE →	$ 30,938.85

TITLE: Budget and Financial Services

SIGNATURE: D. L. Pearson

FPC Form 183A
Rev (6-62)

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Presiding Examiner: You want those considered as evidence?

Mr. Martin: Yes, sir.

Presiding Examiner: Is there any objection?

Mr. Bruder: No objection.

Presiding Examiner: Without objection, they will be considered as evidence.

Mr. Martin: Mr. Examiner, when you referred to the Public Service Company of New Hampshire decision you indicated that it gave rise to some question as to the Commission licensing treatment by date between pre-1935 and post-1935 construction of projects.

As you very properly gathered from our petitions, we share the same concern particularly, and it has come to my attention that the Commission, under date of March 5, 1965 in Project No. 2438 issued a license to New York State Electric and Gas Corporation for a project consisting of two developments, namely, the Waterloo development constructed and placed in operation in June 1915, and the Seneca Falls development constructed and placed in operation in July 1917, both of which are located on the New York State Barge Canal, as is Project 2424 of Niagara Mohawk, the so-called Hydraulic Race project.

The Commission in the New York State Electric and Gas case issued its license effective as of April 1, 1962, and

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terminating December 31, 1993. Here we have the issuance of a license with distinctly less onerous terms and a further date to termination than that offered Niagara Mohawk for the Hydraulic Race project.

May I assume that I am free to refer to that in briefing, argument, and so forth?

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Presiding Examiner: That and any other order, Mr. Martin. Official notice can be taken of any formal action of the Commission issuing any order.

Mr. Martin: Very good, sir. I assumed that would be the case, but I wanted to be sure because it points up exactly the observation that you made.

May I speak off the record for a moment?

Presiding Examiner: Yes.

(Discussion off the record.)

Mr. Martin: Aside from these observations, Mr. Examiner, there are a number of things that I would like to approach informally for possible resolution by way of stipulation or otherwise, and I would prefer to move forward on that basis at this time, if it is agreeable, and then return to the record.

Presiding Examiner: That is what I contemplated counsel might want to do.

Does Staff Counsel have a statement to make on the record with respect to his views and present position?

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Mr. Bruder: Your Honor, it is our understanding that the amortization question is before the Examiner with respect to Project 2424 but not with respect to the other three projects.

Presiding Examiner: Now, the company has not yet accepted the license for that, although the Commission has issued an order authorizing the issuance of the license.

Mr. Bruder: That is correct.

Presiding Examiner: Well, that is something that can be further discussed in the informal discussion.

Mr. Bruder: I have one other question of Mr. Martin. I wonder if these statements of annual charges indicate the date that they were received by the company?

Mr. Martin: As to the statements of annual charges for Project Nos. 2320 and 2330, it is indicated by company stamp that the statements were received not later than October 19, 1964 in each case.

With respect to the statement of charges for Project No. 2318, there does not appear to be any company stamp or other indication of the date of its receipt.

Presiding Examiner: Weren't those dates all stated in your petition for rehearing?

Mr. Martin: I would think so.

With reference to Project No. 2318 statement of annual charges, the recital in the petition for rehearing indicates

that the statement was rendered under stamped date of July 7, 1964. I would assume that it was received within two or three days of that stamped date.

Presiding Examiner: Has Staff Counsel completed his statement?

Mr. Bruder: We would like to continue our statement after the recess, Mr. Examiner.

Presiding Examiner: How much time would counsel suggest be granted for the recess?

Mr. Bruder: That will depend on Mr. Martin's wishes and expectations.

Mr. Martin: Might we try for twenty minutes?

Presiding Examiner: Why not make it thirty, and be sure.

Mr. Martin: Okay.

Presiding Examiner: If it is agreeable to counsel, the prehearing conference on the record is now recessed to reconvene at 11:10 a.m.

(Whereupon, at 10:40 a.m., the prehearing conference was recessed to reconvene at 11:10 a.m.)

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Presiding Examiner: The prehearing conference on the record will be in order.

During the informal discussion, it appeared that counsel desired to have the record reflect certain facts. Those facts do not appear to be extensive, since the real problem here

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seems to relate to legal matters.

Mr. Martin, will you proceed to have the record reflect what it is that you desire to include in the record?

Mr. Martin: Yes, sir.

I ask, Mr. Examiner, that the license for Project 15, labeled "License for Diversion of Treaty Waters, Project No. 15, New York Hydraulic Race Company, et al.," issued by the Commission under date of December 13, 1926, and all subsequent instruments related to that project license, including a certification by Secretary Merrill of June 14, 1928 that the Executive Secretary be authorized to execute the necessary instrument for accepting surrender of the license for Project 15, be made a part of this record by reference.

Presiding Examiner: The whole of the document, or some particular part of it?

Mr. Martin: I ask that Article I of the license be specifically made a part of the record, and since it is only one long paragraph, if you agree, I would read it into the record at this point.

Presiding Examiner: Yes, if you would, because it may not be conveniently available to everyone. Is there any objection?

Mr. Bruder: No objection.

Presiding Examiner: Without objection, you may proceed.

Mr. Martin: I quote from the license for Project 15,

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Article I:

"Article I. The authority to divert, carry, redivert and use the aforesaid 275 cubic feet per second is limited to the place, amount, manner and agencies of diversion, carriage, rediversion and use described herein. *Provided,* however, that nothing contained herein shall be construed as affecting the rights of the said Hydraulic Race Company to the use of the so-called 'surplus waters' of said Barge Canal to be taken and drawn from said canal at the head of the locks in the City of Lockport, and to be discharged into the lower level of said canal under the terms of a certain indenture between Richard Kennedy and Junius H. Hatch and the Canal Commissioners of the State of New York executed on January 25, 1926 and known as the Kennedy and Hatch lease, or any modifications thereof or under any other lease or agreement now existing or hereafter made with the State of New York respecting such surplus waters; and any such surplus may be used either separately or in connection with the waters herein authorized to be diverted. *Provided further,* that the carriage of the waters herein authorized to be diverted or any part thereof and the time, place, amount and manner of the rediversion

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thereof from said barge canal shall be wholly within the option of the State of New York as expressed in the state permit or in any renewal or amendment thereof or otherwise; and that neither this license nor the authority granted hereunder shall be deemed to place any obligation whatsoever upon the State of New York with respect to the carriage or rediversion of said water."

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That is the complete text of Article I.

Presiding Examiner: During the informal conference you referred to the fact that this license had been withdrawn but that you nevertheless wanted that particular article included in the record for a specific reason.

Would you indicate that reason on the record?

Mr. Martin: My reason for wanting to have in the record and to call to the attention of the Commission Article I just read is my premise that the Commission in granting the 1926 license for Project No. 15 was specifically aware of the water power use of the so-called Kennedy and Hatch waters at Lockport which are the very subject of the use of waters by Project No. 2424 now at issue.

Presiding Examiner: But was there any other data or facts that you desired to have reflected on the record?

Mr. Martin: Not that I recall, other than the awareness by the Commission through a license instrument of the use of

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the Kennedy and Hatch waters without license from the Commission at that time.

Presiding Examiner: During the conference there was further discussed the penalty provision in Section 11.31 of the Regulations under the Federal Power Act.

What is your present desire with respect to your request for waiver of the penalty?

Mr. Bruder: Your Honor, I wonder if I might clarify one point with respect to the license for Project No. 15.

Has the entire license been introduced by reference into the record?

Presiding Examiner: Is that the desire of counsel?

Mr. Martin: That is my request in order that each party may have it fully available, and my sole purpose, as al-

ready stated, is with reference to Article I and the historic background indicated by that article.

Presiding Examiner: The entire license is identified as Item A, and without objection, it is received in evidence.

(The document referred to was identified as item "A" and incorporated in evidence by reference.)

Mr. Bruder: And that includes the amendments as well as the license?

Presiding Examiner: Yes.

Mr. Martin: Mr. Examiner, with reference to the penalty provisions for non-payment of annual charges, in both the

petition for rehearing dated August 11, 1964 in Project 2318 and in the rehearing petition of November 9, 1964 for Project Nos. 2320 and 2330, request was made to the Commission that imposition of penalty charges be waived for the period to and including final determination of each such application.

While the Commission has granted rehearing or reconsideration with respect to the three sets of project charges, I have not been formally advised of favorable action on my request for waiver of imposition of penalty charges.

I respectfully ask that you, sir, if you are the appropriate vehicle, refer that matter to the Commission so that there will be no uncertainty of the granting of the specific relief sought in each of those two applications.

Presiding Examiner: The portion of the transcript reflecting the remarks you have just made concerning the penalty provision will be transmitted to the Commission for its consideration and action.

I think it desirable that the record reflects also for the Commission's consideration the present position of Staff

Counsel. The matter is of some importance to company counsel, and it would seem that an early ruling is desired.

Mr. Bruder: Our position is that the Regulation is self-operative and creates a penalty unless the penalty is waived. We have no objection to certification by the Examiner to the Commission of the question raised by Mr. Martin.

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Presiding Examiner: I think you will agree that there are two situations. One is where a company after having paid charges over a number of years ceases to pay for a period of time. In that situation, I think there could be no question but what the penalty provision would be self-operative.

The question presented here is whether in the circumstances of this particular case the penalty provision is self-operating and, if it is, whether or not the Commission would waive or would want to waive that provision.

As I indicated, the remarks of counsel will be transmitted to the Commission for its consideration and action.

Mr. Martin: Thank you, sir.

Presiding Examiner: Didn't you have a further matter?

Mr. Martin: Yes.

Presiding Examiner: You may proceed, Mr. Martin.

Mr. Martin: Mr. Examiner, you will recall that in the record remarks prior to the recess, I made reference to the failure of the Commission to advise Niagara Mohawk as licensee for Projects 2318, 2320 and 2330 of the determination for each fiscal year of the costs of administration of Part 1 of the Federal Power Act, charges to licensees, to which reference is made in Section 11.20 of the Regulations under the Federal Power Act. To me that is a de-

fect in the Commission's assessment of charges if it is ultimately to be determined—and I certainly don't waive the point now—that charges

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for annual administration are payable in respect of the three indicated projects for a time prior to the current billings, and I make the request that the Commission's staff augment the record to indicate the factual background for the assessments indicated in the bills which have been made a part of the record.

Presiding Examiner: Is that information available?

Mr. Bruder: Your Honor, it is our position that the information is not material to the resolution of the issues in this case.

Presiding Examiner: Well, is the information available?

Mr. Bruder: The information is available for a part of the period, for at least three years of the period here involved, and has been stated in an order or notice of the Commission in the rule making in Docket R-228.

Presiding Examiner: Well, that can be referred to even without inclusion in the record.

Mr. Bruder: Yes, sir, I believe that is correct.

Presiding Examiner: Then it is understood that counsel can refer to it.

Mr. Martin: Yes, sir.

Presiding Examiner: Mr. Martin, I believe you had one other matter.

Mr. Martin: Mr. Examiner, my attention was called by Counsel for the Commission's Staff with respect to the

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allegations of error in the petition for rehearing for Project 2424 relating to the determination of the number of horsepower to be used as the rated capacity for fixation

of a portion of the annual charges for this project and to the allegation of error with respect to the dating of the license if it is to be backdated as to time of construction.

As to the latter allegation, I withdraw it. I don't think it is material to a determination of the issues. I do so on advice of Commission Counsel that the date selected marks the commencement of actual construction, and if that is his intention, I have no quarrel with that date rather than the date of operation. Of course, as to effective dates, we are in complete disagreement.

With your consent, then, and with Commission Counsel's approval, I shall by April 30 advise Commission Counsel by letter of our view with respect to the amount of horsepower properly to be fixed in the license instrument for Project No. 2424. I don't believe that we will have ultimate disagreement on this score now that I understand the formula utilized by the Commission in granting licenses for determining horsepower, but our views will be complete in such a letter, and I would request that a number be reserved for an item or exhibit, as you see fit, for such letter as part of the record.

Presiding Examiner: That letter will be assigned

Exhibit No. 1.

Will there be any objection to that letter being considered as part of the record in this proceeding when received?

Mr. Bruder: As I understand it, that would be part of the pleadings in the proceeding. I have no objection. It would in effect be an amendment of his pleadings.

Mr. Martin: Well, it may or may not be. I don't anticipate any difficulty on that score.

Mr. Bruder: It would be, if he were to retract his objection, an amendment of his pleadings. If he were to press his objections, it would be merely a clarification.

Presiding Examiner: Yes, but it should be specifically identified.

Mr. Bruder: We have no objection to that.

Presiding Examiner: Accordingly, the letter is, as I have indicated, identified and received in evidence as Exhibit No. 1.

(The document referred to was marked for identification as Exhibit No. 1, and received in evidence.)

Mr. Martin: That is all I have to offer, sir.

Presiding Examiner: Staff Counsel I think had certain information that he desired to include in the record.

Mr. Bruder: We would like to include in the record the previous regulations of the Commission with respect to annual

charges, particularly Regulation 14 as it was included in the Rules and Regulations of the Commission issued in 1921.

Presiding Examiner: Is that an extended rule?

Mr. Bruder: It covers several pages.

Presiding Examiner: Can it be understood that official notice may be taken of that rule for the purpose of the decision in this proceeding?

Mr. Martin: I would so agree.

Presiding Examiner: Very well.

Mr. Bruder: Secondly, Section No. 11.20 of the Commission's regulations issued in 1958 in the Commission's Order 205 issued on June 6, 1958 in Docket No. R-129.

Presiding Examiner: Official notice will be taken of those two.

Mr. Bruder: Thirdly, Order 272-A, issued on June 18, 1964 in Docket No. R-228.

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Presiding Examiner: That is another document official notice may be taken of.

Mr. Bruder: Finally, the notice in Docket R-228 issued on December 28, 1962.

Presiding Examiner: Is that published?

Mr. Bruder: That is a published notice printed in the Federal Register.

Presiding Examiner: Do you have the citation?

Mr. Bruder: Yes, I do. 28 Federal Register 128,

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published on January 4, 1963.

Presiding Examiner: Very well, official notice will also be taken of that publications.

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Presiding Examiner: Does that conclude your statement?

Mr. Bruder: That concludes our statement, Your Honor.

Presiding Examiner: Then as I understand it, counsel are agreed that the issues in this proceeding may be considered and disposed of on the record made this morning?

Mr. Martin: Mr. Examiner, I am embarrassed to state that I had overlooked one further piece of subject matter which I think may be of relevance in the determination of this proceeding.

You will recall that the Commission in Docket No. IT-5501 sent to a great many water power project owners throughout the country a copy of the Commission's determination in the Public Service Company of New Hampshire case, Opinion No. 357 to which reference has already been made in the record.

I should like this record to show—if counsel for the Staff will so stipulate—that Niagara Mohawk received

such a letter stamped May 4, 1962, and that with respect to the three projects under consideration here already licensed and the Hydraulic Race Company, Project No. 2424, for which license was issued, not accepted, and rehearing sought, in each one of the four cases the applications were voluntarily filed by Niagara Mohawk without the commencement of proceedings by the Commission through an order to show cause or in any other such manner.

Presiding Examiner: Does Staff Counsel so stipulate?

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Mr. Bruder: We so stipulate.

Presiding Examiner: Again as I started to say a few moments ago, as I understand it counsel are agreed that the issues in this proceeding may be disposed of on the basis of the record made today during the prehearing conference on the record.

Mr. Bruder: That is true, Your Honor.

Mr. Martin: I so agree.

Presiding Examiner: How much time will counsel require for filing of main and reply briefs?

Mr. Martin: My suggestion, Mr. Examiner, would be that main briefs be exchanged on or before May 17, which I think is a Tuesday, and that reply briefs be exchanged two weeks later.

I assume the procedure is for simultaneous briefs, both main and reply.

Presiding Examiner: That is what I had in mind.

Mr. Bruder: Your Honor, I have an appearance in the District Court in Montana on May 11, and I have a hearing in the Virginia Electric and Power headwater benefits case on May 25. Therefore, with your permission, we

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would request that briefing of this case be postponed until early June.

Presiding Examiner: Are you referring to the main or reply brief, or both?

Mr. Bruder: To the main brief.

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Presiding Examiner: What date?

Mr. Bruder: June 8, which is a Tuesday, would be satisfactory, Your Honor.

Presiding Examiner: What about reply briefs?

Mr. Bruder: It would be satisfactory for reply briefs to be filed within the period stated by Mr. Martin, which I believe was two weeks.

Presiding Examiner: Do you have any objection to those amended dates, Mr. Martin, in view of counsel's other commitments?

Mr. Martin: I have no objection, Your Honor.

Presiding Examiner: Without objection, then, the main briefs will be filed on June 8, and reply briefs will be filed on June 22, 1965.

Is there anything further to be said, or any further evidence to be offered before this record is closed?

Mr. Martin: Nothing further, sir.

Mr. Bruder: Nothing further.

Presiding Examiner: There being nothing further, this prehearing conference is concluded.

(Whereupon, at 11:45 p.m., the prehearing conference was concluded.)

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman;
Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

Niagara Mohawk Power Corporation Project No. 2318

Order Issuing License (Major)

(Issued June 25, 1963)

Application was filed on July 20, 1962 by Niagara Mohawk Power Corporation (Applicant) of Syracuse, New York, for a license under Section 4 (e) of the Federal Power Act (Act) for constructed Project No. 2318, located on the Sacandaga River in the vicinity of the villages of Hadley and Conklingville, Saratoga County, New York.

The project, known as the E. J. West Plant, which is located about 6 miles upstream from the confluence of the Sacandaga and Hudson Rivers, commenced operation in 1930. The powerhouse contains two 14,000 horsepower turbines each connected to a generator of 10,000 kilowatt capacity. Power developed by the project is integrated into Applicant's transmission system for ultimate delivery to its customers.

In Docket No. DI-177, New York Power and Light Corp. (8 FPC 231-250), the Commission, on April 18, 1949, found, among other things, that the Sacandaga River is a navigable water of the United States from Northville, at the head of the Conklingville Reservoir, to its mouth at Hadley. In accordance with the criteria set forth in the Commission's

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Opinion 357, issued April 25, 1962,[1] we are making the effective date of this license April 1, 1949, the first of the month in which we determined the Sacanda River to be a navigable water, and the termination date December 31, 1993.

The Secretary of the Army and the Chief of Engineers, in reporting on the application, advised that the plans of the project structures are satisfactory insofar as the interests of navigation are concerned; that special terms and conditions in the interest of navigation are not considered necessary; and that the tracings of the project structures affecting navigation have been approved pursuant to Section 4 (e) of the Act.

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Project No. 2318

The Department of the Interior, in reporting on the application, advised that according to the Fish and Wildlife Service, the project has no significant effect on fish and wildlife resources and that no special license conditions for the protection of such resources are necessary, and that other interests of the Department are not adversely affected.

Although invited to do so, no reports on the application have been received from any New York State agencies.

The Commission finds:

(1) Applicant is a corporation organized under the laws of the State of New York and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effectuate the purpose of a license for the project.

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[1] Public Service Company of New Hampshire, Project No. 2288, (27 FPC 830, 839).

(2) No conflicting application is before the Commission. Public notice of the filing of the application has been given as required by the Act. No protests have been received.

(3) The issuance of a license as hereinafter provided will not affect a Government dam or the development of any water resources for public purposes which should be undertaken by the United States.

(4) The project is best adapted to a comprehensive plan for improving and developing the Sacandaga River for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes, upon the terms and conditions hereinafter imimposed.

(5) The installed horsepower capacity of the project hereinafter authorized for the purpose of computing the capacity component of the administrative annual charge is 27,000 horsepower, and the amount of such charges, based upon such capacity, is reasonable as hereinafter fixed and specified.

(6) The exhibits hereinafter designated and described in ordering paragraph (B) below conform to the Commission's rules and regulations and should be approved as part of the license for the project.

The Commission orders:

(A) This license is hereby issued to Niagara Mohawk Corporation (Licensee) under Section 4 (e) of the Federal Power Act (Act) for a period effective as of April 1, 1949 and terminating December 31, 1993, for the continued operation and maintenance of Project No. 2318, located on the Sacandaga River, a navigable water of the United States, in Saratoga County, New York, subject to the terms and conditions of the Act, which is incorporated herein by refer-

ence, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

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Project 2318

(B) Constructed Project No. 2318 [1] consists of:

(i) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interests in such lands necessary or appropriate for the purpose of the project, whether such lands or interests therein are owned or held by the applicant or by the United States; such project area and project boundary being more specifically shown and described by certain exhibits which formed part of the application for license and which are designated and described as follows:

Exhibit J: (FPC No. 2318-1) General Location Plan

Exhibit K: (FPC No. 2318-2) Detail Map

(ii) The project consists of an intake structure with tractor type headgates located at the downstream end of the spillway channel of the Conklingville Dam, of the Hudson River—Black River Regulating District of the State of New York; four concrete penstocks, two for each unit; a powerhouse located 600 feet downstream containing two 14,000 horsepower turbines each connected to a generator of 10,000 kw capacity; tailrace and other necessary appurtenances; the location, nature and character of which are more specifically shown and described by the exhibits

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[1] We are not licensing as a part of the subject project the Sacandaga Reservoir from which Applicant takes water under a contractual arrangement with its owner, the Hudson River-Black River Regulation District of the State of New York, nor did Applicant include such reservoir in its application for license.

which also formed part of the application for license and which are designated and described as follows:

Exhibit L: (FPC No. 2318-3) Plan and Sections

Exhibit M: Four typewritten sheets, entitled "Exhibit M", giving a general description of mechanical and electrical equipment.

(iii) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as a part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance and operation of the project.

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Project No. 2318

(C) This license is also subject to the terms and conditions set forth in Form L-3, December 15, 1953, entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States (17 FPC 385-389), which terms and conditions, designated as Articles 1 through 17, are attached hereto and made a part hereof, except for Articles 7, 12 and the last sentence of Article 11; and subject to the following special conditions set forth herein as additional articles:

Article 18. Whenever the United States shall desire, in connection with the project, to construct fish handling facilities or to improve the existing fish handling facilities at its expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of Licensee's lands and interests in lands, reservoirs, waterways and pro-

ject works as may be reasonably required to complete such fish handling facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be prescribed by the Commission, consistent with the primary purpose of the project, in order to permit the maintenance and operation of the fish handling facilities constructed or improved by the United States under the provision of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish handling facilities or to relieve the Licensee of any obligation under this license.

Article 19. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

Article 20. The Licensee shall install additional capacity and make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so, after notice and opportunity for hearing.

Article 21. The Licensee shall pay to the United States the following annual charges:

For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, one (1) cent on the authorized installed capacity (27,000 horsepower) plus two and one-half (2½) cents per 1,000 kilowatt-hours of gross energy generated during the calendar year for which the charge is made; or such other amounts as may

hereafter be determined as necessary to reimburse the United States for the costs of administration.

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Project No. 2318

Article 22. The Licensee shall for the protection of navigation, construct, maintain, and operate at its own expense such lights and other signals on fixed project structures in or over navigable waters of the United States as may be directed by the Secretary of the Department in which the Coast Guard is operating.

Article 23. The Commission reserves the right to determine at a later date what transmission facilities, if any, should be included in the license as part of the project works.

Article 24. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and recreational purposes, including fishing and hunting, and shall allow to a reasonable extent for such purposes the construction of access roads, wharves, landings, and other facilities on its lands the occupancy of which may in appropriate circumstances be subject to payment of rent to the Licensee in a reasonable amount; Provided that the Licensee may reserve from public access, such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property, and Provided further, that the Licensee's consent to the construction of access roads, wharves, landings, and other facilities shall not, without its express agreement, place upon the Licensee any obligation to construct or maintain such facilities. These facilities are

ject works as may be reasonably required to complete such fish handling facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be prescribed by the Commission, consistent with the primary purpose of the project, in order to permit the maintenance and operation of the fish handling facilities constructed or improved by the United States under the provision of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish handling facilities or to relieve the Licensee of any obligation under this license.

Article 19. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

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Project No. 2318

Article 22. The Licensee shall for the protection of navigation, construct, maintain, and operate at its own expense such lights and other signals on fixed project structures in or over navigable waters of the United States as may be directed by the Secretary of the Department in which the Coast Guard is operating.

Article 23. The Commission reserves the right to determine at a later date what transmission facilities, if any, should be included in the license as part of the project works.

Article 24. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and recreational purposes, including fishing and hunting, and shall allow to a reasonable extent for such purposes the construction of access roads, wharves, landings, and other facilities on its lands the occupancy of which may in appropriate circumstances be subject to payment of rent to the Licensee in a reasonable amount; Provided that the Licensee may reserve from public access, such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property, and Provided further, that the Licensee's consent to the construction of access roads, wharves, landings, and other facilities shall not, without its express agreement, place upon the Licensee any obligation to construct or maintain such facilities. These facilities are

in addition to the facilities that the Licensee may construct and maintain as required by license.

Article 25. The Licensee shall within one year from the date of issuance of this license, file with the Commission a recreational use plan for the project which shall include not only recreational improvements which may be provided by others, but the recreational improvements the Licensee plans to provide.

(D) The exhibits designated and described in Paragraph (B) above are hereby approved as part of this license.

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Project No. 2318

(E) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313 (a) of the Act, and failure to file such an aplication shall constitute acceptance of this license. In acknowledgment of the acceptance of this license, it shall be signed for the Licensee and returned to the Commission within 60 days from the date of issuance of this order.

By the Commission.

JOSEPH H. GUTRIDE,
Secretary.

Project No. 2318

IN TESTIMONY of its acknowledgment of acceptance of all the provisions, terms and conditions of this license, Niagara Mohawk Power Corporation, this 11th day of September, 1963, has caused its corporate named to be signed hereto by Lauman Martin, its Vice President, and its corporate seal to be affixed hereto and attested by John G. Benack, its Secretary, pursuant to a resolution of its Board

of Directors duly adopted on the 28th day of August, 1963, a certified copy of the record of which is attached hereto.

NIAGARA MOHAWK POWER CORPORATION

BY LAUMAN MARTIN,
Vice President

Attest:
JOHN G. BENACK,
Secretary

(Executed in quadruplicate)

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Form L-3
December 15, 1953

FEDERAL POWER COMMISSION

Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States

Article 1. The entire project, as described in the order of the Commission, shall be subject to all the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: Provided, however, that if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval amended, supplemental, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such

exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. If the Licensee shall contemplate any alteration in or addition to the project area or project works shown and described by the approved exhibits referred to in Article 2 herein, the Licensee shall submit to the Commission for approval amended, supplemental, or additional

exhibits under the provisions of said article covering such alteration or addition, together with a statement in writing setting forth the reasons which necessitate or justify such alteration or addition. Except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works under the license without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in the project works or divergence from such approved exhibits may be made if such changes will not result in decrease in efficiency, in material increase in cost, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may from time to time prescribe for the protection of life, health, or property.

Article 4. The project, including its operation and maintenance and any work incident to additions or alterations, shall be subject to the inspection and supervision of the Regional Engineer, Federal Power Commission, in the re-

gion wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall furnish to said representative such information as he may require

concerning the operation and maintenance of the project, and of any alteration thereof, and shall notify him of the date upon which work with respect to any alteration will begin, and as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall allow him and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties.

Article 5. For the purpose of determining the stage and flow of the stream or streams from which water is diverted for the operation of the project works, the amount of water held in and withdrawn from storage, and the effective head on the turbines, the Licensee shall install and thereafter maintain such gages and stream-gating stations as the Commission may deem necessary and best adapted to the requirements; and shall provide for the required readings of such gages and for the adequate rating of such stations. The Licensee shall also install and maintain standard meters adequate for the determination of the amount of electric energy generated by said project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission and may be altered from time to time if necessary to secure adequate determinations, but such alteration shall not be

made except with the approval of the Commission or upon the specific direction of the Commission. The installation of gages, the ratings of said stream or streams, and the determination of the flow

thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of said project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient record of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 6. In the maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines, and telegraph, telephone, and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling and obstructing traffic and endangering life on highways, streets, or railroads.

Article 7. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and recreational purposes, including fishing and

hunting, and shall allow to a reasonable extent for such purposes the construction of access roads, wharves, landings, and other facilities on its lands the occupancy of which may in

appropriate circumstances be subject to payment of rent to the Licensee in a reasonable amount: Provided, that the Licensee may reserve from public access, such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property and Provided further, that the Licensee's consent to the construction of access roads, wharves, landings, and other facilities shall not, without its express agreement, place upon the Licensee any obligation to construct or maintain such facilities.

Article 8. Insofar as any material is dredged or excavated in the prosecution of any work authorized under the license, or in the maintenance of the project, such material shall be removed and deposited so it will not interfere with navigation, and will be to the satisfaction of the District Engineer, Department of the Army, in charge of the locality.

Article 9. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with the project, the Licensee shall convey to the United States, free of cost, such of its lands and its rights-of-way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete and maintain such navigation facilities.

Article 10. The Licensee shall furnish free of cost to the United States power for the operation and maintenance of navigation facilities at the voltage and frequency required by such facilities and at a point adjacent thereto whether

said facilities are constructed by the Licensee or by the United States.

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Article 11. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure constituting a part of the project works shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army. Such rules and regulations may include the construction, maintenance, and operation by the Licensee, at its own expense, of such lights and signals as may be directed by the Secretary of the Army.

Article 12. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

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Article 13. The actual legitimate original cost, estimated where not known, and the accrued depreciation of the project as of the effective date of the license shall be determined by the Commission in accordance with the Act and the rules and regulations of the Commission, and such cost less such accrued depreciation, so determined, shall be the net investment in the project as of such effective date.

Article 14. After the first twenty (20) years of operation of the project under the license, six (6) percent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings of the project for the establishment and maintenance of amortization reserves, pursuant to Section 10(d) of the Act; one-half of the project surplus earnings, if any, accumulated after the first twenty years of operation under the license, in excess of six (6) percent per annum on the net investment, shall be set aside in a project amortization reserve account as of the end of each fiscal year, provided that, if and to the extent that there is a deficiency of project earnings below six (6) percent per annum for any fiscal year or years after the first twenty years of operation under the license, the amount of such deficiency shall be deducted from the amount of any surplus earnings accumulated thereafter until absorbed, and one-half of the remaining surplus earnings, if any, thus cumulatively computed, shall be set aside in the project amortization reserve account; and the amounts thus established in the project amortization reserve account shall be maintained therein until further order of the Commission.

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Article 15. No lease of the project or part thereof whereby the lessee is granted the exclusive occupancy, possession, or use of project works for purposes of generating,

transmitting, or distributing power shall be made without the prior written approval of the Commission; and the Commission may, if in its judgment the situation warrants, require that all the conditions of the license, of the Act, and of the rules and regulations of the Commission shall be applicable to such lease and to such property so leased to the same extent as if the lessee were the Licensee: Provided, that the provisions of this article shall not apply to parts of the project or projects works which may be used by another jointly with the Licensee under a contract or agreement whereby the Licensee retains the occupancy, possession, and control of the property so used and receives adequate consideration for such joint use, or to leases of land while not required for purposes of generating, transmitting, or distributing power, or to buildings or other property not built or used for said purposes, or to minor parts of the project or project works, the leasing of which will not interfere with the usefulness or efficient operation of the project by the Licensee for such purposes.

Article 16. The Licensee, its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties necessary or useful to the project and to the development, transmission, and distribution of power therefrom will be voluntarily sold, transferred, abandoned,

or otherwise disposed of without the approval of the Commission: Provided, that a mortgage or trust deed or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article. In the event the project is taken over by the United States

upon the termination of the license, as provided in Section 14 of the Act, or is transferred to a new licensee under the provisions of Section 15 of the Act, the Licensee, its successors and assigns will be responsible for and will make good any defect of title to or of right of user in any of such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge, or will assume responsibility for payment and discharge, of all liens or incumbrances upon the project or project property created by the Licensee or created or incurred after the issuance of the license: Provided, that the provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear, or to require the Licensee, for the purpose of transferring the project to the United States or to a new licensee, to acquire any different title to or right of user in any of such project property than was necessary to acquire for its own purposes as Licensee.

Article 17. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Harold C. Woodward, and David S. Black.

(Niagara Mohawk Power Corporation)

Project No. 2320

Order Issuing License (Major)

(Issued June 12, 1964)

Application was filed on September 7, 1962 by Niagara Mohawk Power Corporation (Applicant) of Syracuse, New York, for a license under Section 4(e) of the Federal Power Act (Act) for constructed Project No. 2320, known as the Raquette River Project, located on the Raquette River in St. Lawrence County, New York.

Project No. 2320 consists of four developments known respectively as Higley, Colton, Hannawa and Sugar Island. Hannawa has been in operation since 1902. The Sugar Island, Coulton and Higley developments commenced operations in 1925. Applicant states that the original structures of the developments remain today basically unchanged. The developments are situated on the Raquette River between its mouth and a point downstream from Piercefield. In Docket No. DI-179, *In the Matter of Central New York Power Corporation*[1] (*Successor to* Northern Development Corporation, the Commission in its Opinion No. 185, issued November 22, 1949, found that the "Ra-

[1] Central New York Power Corporation was consolidated with two other companies on January 5, 1950 and the survivor became Niagara Mohawk Power Corporation.

quette River, from its confluence with the St. Lawrence River to at least Piercefield at about mile 91 is a navigable waterway of the United States." (8 FPC 390)

In accordance with the criteria set forth in our April 25, 1962 Opinion No. 357 and Order issuing license to Public Service Company of

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Project No. 2320

New Hampshire for Project No. 2288 (27 FPC 830), the license herein granted shall have an effective date of November 1, 1949 and a termination date of December 31, 1993.

The Secretary of the Army and the U.S. Corps of Engineers, Department of the Army, have reported that the plans of the project structures affecting navigation are considered satisfactory, and the plans were approved pursuant to the provisions of Section 4(e) of the Act.

The Department of the Interior recommended for inclusion in any license issued for the project certain conditions in the interest of the Department.

The Commission finds:

(1) The project is located on navigable waters of the United States.

(2) Applicant is a corporation organized under the laws of the State of New York and has submitted satisfactory evidence of its compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license.

(3) Public notice of the application has been given as required by the Act. No protests or petitions to intervene

have been received. No conflicting application is before the Commission.

(4) The project does not affect a Government dam, nor will the issuance of a license therefor, as hereinafter provided, affect the development of any water resources for public purposes which should be undertaken by the United States.

(5) The project is best adapted to a comprehensive plan for improving and developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes, upon compliance with the terms and conditions hereinafter imposed.

(6) The installed horsepower capacity of the project for the purpose of computing the capacity component of the administrative annual charge is 61,300 horsepower, and the amount of annual charges, based

on such capacity, to be paid under the license for the project, for the costs of administration of Part I of the Act is reasonable as hereinafter fixed and specified.

(7) The transmission facilities described in paragraph (B) below, and *which were included* as part of the application for license, are parts of the project within the meaning of Section 3(11) of the Act and should be included in the license for the project.

(8) The following described transmission facilities *which were not included* in the application for license are parts of the project within the meaning of Section 3(11) of the Act and should be included in the license as hereinafter provided:

(a) At the Higley plant, the generator leads, the 4.8/115 kv transformer, the 4.8/13.2kv transformer, and associated facilities;

(b) At the Colton plant, the 115 kv leads to the Colton 115 kv substation, and appurtenant facilities; and

(c) At the Hannawa plant, the 23 kv bus tie line about 800 feet long to the Sandstone substation, and appurtenant facilities.

(9) The exhibits designated and described in paragraph (B) below, which were included in the application for license, conform to the Commission's rules and regulations, and should be approved as part of the license for the project.

The Commission orders:

(A) This license is hereby issued to Niagara Mohawk Power Corporation (Licensee) under Section 4(e) of the Act for a period effective as of November 1, 1949 and terminating December 31, 1993, for the continued operation and maintenance of Project No. 2320 located on the Raquette River, a navigable water of the United States, subject to the terms and conditions of the Act, which is incorporated by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

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(B) Project No. 2320 consists of:

(i) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interests in such lands necessary or appropriate for the purpose of the project, whether such lands or interests therein are owned or held by the appli-

cant or by the United States; such project area and project boundary being more specifically shown and described by certain exhibits which formed part of the application for license and which are designated and described as follows:
Exhibit J: (FPC No. 2320-1) General Location Map
Exhibit K: (6 sheets) Detail Maps

1 (FPC No. 2320-2) Sugar Island
2 (FPC No. 2320-3) Hannawa
3 (FPC No. 2320-4) Colton
4 (FPC No. 2320-5) Colton
5 (FPC No. 2320-6) Higley
6 (FPC No. 2320-7) Higley

(ii) Project works consisting of:

Higley Development: located about 47 miles upstream from the Raquette River's confluence with the St. Lawrence River and about 4 miles downstream from the South Colton development (FPC License No. 2084), consisting of a concrete gravity dam 34 feet high and 207 feet long; a reservoir having an area of about 700 acres with a normal pool elevation of 883.6 feet (USGS datum); an open concrete flume; a reinforced concrete powerhouse containing three hydroelectric units with a total generating capacity of 4,480 kw; and appurtenant electrical and mechanical facilities;

Colton Development: located 2 miles below the Higley development, consisting of a concrete gravity dam 27 feet high and 205 feet long; a reservoir having an area of

152 acres with a normal pool elevation of 837 feet; a steel pipeline; a surge tank; steel penstocks; a brick and structural steel powerhouse containing three hydroelectric units with a total generating capacity of 29,520 kw; three 13.8/115 kv transformers; and appurtenant electrical and mechanical facilities;

Hannawa Development: located 6 miles below the Colton development, consisting of a stone and concrete-gravity dam 40 feet high and 215 feet long; a reservoir having an area of 168 acres with a normal pool elevation of 552 feet; an open canal; steel penstocks; a stone and structural steel powerhouse containing two hydroelectric units with a total generating capacity of 7,200 kw; an outdoor 4.8/23 kv transformer; and appurtenant electrical and mechanical facilities; and

Sugar Island Development: located 1 mile below the Hannawa development, consisting of a concrete-gravity dam 37 feet high and 181 feet long; a reservoir having an area of 29 acres with a normal pool elevation of 470 feet; a steel pipeline; a surge tank; steel penstocks; a brick and structural steel powerhouse containing two hydroelectric units with a total generating capacity of 4,800 kw; an outdoor 4.8/115 kv transformer; and appurtenant electrical and mechanical facilities;

the location, nature and character of which are more specifically shown and described by the exhibits which also formed part of the application for license and which are designated and described as follows:

Exhibit L: (8 sheets) Plans, Elevations & Sections

1 (FPC No. 2320-8) Higley
2 (FPC No. 2320-9) Colton, General
3 (FPC No. 2320-10) Colton, Dam & Intake
4 (FPC No. 2320-11) Colton, Surge Tank & Powerhouse
5 (FPC No. 2320-12) Hannawa, Dam, Canal & Intake
6 (FPC No. 2320-13) Hannawa, Forebay, Penstocks & Powerhouse
7 (FPC No. 2320-14) Sugar Island, General
8 (FPC No. 2320-15) Sugar Island, Dam, Surge Tank & Powerhouse

Exhibit M: A cover sheet entitled *Exhibit "M", Raquette River Project,* five typewritten sheets giving a general description of mechanical and electrical equipment, and the following four drawings:

No. 24197 Sugar Island, Operating Diagram
No. 20246 Hannawa, Operating Diagram
No. 20335 Colton, Switching Diagram
No. 20669 Higley, Operating Diagram

(iii) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as a part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance and operation of the project.

(C) This license is also subject to the terms and conditions set forth in Form L-3 (Revised November 1, 1963), entitled "Terms and Conditions of License for Constructed Project Affecting Navigable Waters of the United States (30 FPC), which terms and conditions, designated as Articles 1 through 27, are attached hereto and made a part hereof except for Article 4 thereof; and subject to the following special conditions set forth herein as additional articles:

Article 28. The project, including its operation and maintenance and any work incident to additions or alterations authorized by the Commission whether or not conducted upon lands of the United States, shall be sub-

ject to the inspection and supervision of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him such information as he may require concerning the operation and maintenance of the project, and of any such alteration thereof, and shall notify him of the date upon which work with respect to any alteration will begin, and as far in advance

thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. Licensee shall submit to said representative a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of any such alterations to the project. Construction of said alterations or any feature thereof shall not be initiated until the program of inspection for the alterations or any feature thereof has been approved by said representative. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties.

Article 29. The Licensee shall pay to the United States the following annual charge:

For the purpose of reimbursing the United States for the costs of administration of Part I of the Act one (1) cent per horsepower on the authorized installed capacity

(61,300 horsepower) plus two and one-half (2½) cents per 1,000 kilowatt-hours of gross energy generated during the calendar year for which the charge is made; or such other amounts as may hereafter be determined as necessary to reimburse the United States for the costs of administration.

Article 30. The Licensee shall within six months from the date of issuance of this license, file with the Commission an application for amendment of this license to include the following transmission facilities:

1. At the Higley plant, the generator leads, the 4.8/115 kv transformer, the 4.8/13.2 kv transformer and appurtenant facilities;

2. At the Colton plant, the 115 kv leads to Colton 115 kv substation and appurtenant facilities;

3. At the Hannawa plant, the 23 kv bus tie line about 800 feet long to the Sandstone substation and appurtenant facilities.

Article 31. The Licensee shall within one year from the date of issuance of the license, file with the Commission for approval its proposed

recreational use plan for the project. The plan shall be prepared after consultation with appropriate Federal, State and local agencies, and shall include recreational improvements which may be provided by others in addition to the improvements the Licensee plans to provide.

Article 32. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Licensee shall reimburse the

owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission shall determine to be equitable, and shall pay to the United States the cost of making such determination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States the Licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the costs of making the determinations pursuant to the then current Commission Regulations under the Federal Power Act within 60 days from the date of rendition of a bill therefor and, upon failure to do so, shall thereafter be subject to the payment of the penalties specified in the then current Regulations. The Licensee shall have the right to pay such amounts under protest within the 60-day period and to reconsideration of the amounts billed or a hearing as provided by the then current Regulations under the Act.

(D) The exhibits designated and described in paragraph (B) above are hereby approved as part of the license for the project.

(E) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313 (a) of the Act, and failure to file such an application shall constitute acceptance of this license. In acknowledgement of the acceptance of this license, it shall be signed for the licensee and returned to the Commission within 60 days from the date of issuance of this order.

By the Commission.

JOSEPH H. GUTRIDE,
Secretary.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Harold C. Woodward, and David S. Black

(Niagara Mohawk Power Corporation)
Project No. 2330

Order Issuing License (Major)

(Issued July 15, 1964)

Application was filed on December 14, 1962 by Niagara Mohawk Power Corporation (Applicant) of Syracuse, New York, under Section 4(e) of the Federal Power Act (Act) for the constructed Raquette River Project, designated as Project No. 2330, located on the Raquette River in St. Lawrence County, New York.

Project No. 2330 is located on the Raquette River downstream from Applicant's constructed and licensed Project No. 2084 and from constructed Project No. 2320. Project No. 2330 consists of four hydroelectric developments known as (going downstream) Norwood, East Norfolk, Norfolk and Raymondville. These developments were constructed between 1904 and 1928, various changes and additions having been made during these years.

The entire Project No. 2330 has a total installed capacity of 15,320 horsepower connected to generators having a total rated capacity of 11,500 kilowatts. The energy generated by the project is delivered to Applicant's transmission and distribution system for public utility purposes.

In Docket No. DI-179, In the Matter of Central New York Power Corporation[1] (Successor to Northern De-

velopment Corporation), the Commission in its Opinion, No. 185, issued November 22, 1949, found that the "Raquette River, from its confluence with the St. Lawrence River to at least Piercefield at about mile 91 is a navigable waterway of the United States." (8 FPC 390).

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The Secretary of the Army and the Chief of Engineers, in reporting on the application, advised that the project structures affecting navigation are satisfactory, and that the plans of the structures affecting navigation had been approved pursuant to Section 4(e) of the Act.

The Department of the Interior, in reporting on the application, recommended for inclusion in any license for the project certain conditions in the interests of fish and wildlife resources.

For the reasons set forth in our Opinion No. 357 (27 FPC 830), the license herein granted shall have a termination date of December 31, 1993. Since there was no project construction after 1935, we will make the effective date of the license November 1, 1949, the first day of the month in which we determined the Raquette River to be a navigable water, as set forth above.

The Commission finds:

(1) Applicant is a corporation organized under the laws of the State of New York and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effectuate the purposes of a license for the project.

(2) No conflicting application is before the Commission. Public notice of the filing of the application has been given

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1 Central New York Power Corporation was consolidated with two other companies on January 5, 1950 and the survivor became Niagara Mohawk Power Corporation.

as required by the Act. No protests or petitions to intervene have been received.

(3) The issuance of a license as hereinafter provided will not affect a Government dam or the development of any water resources for public purposes which should be undertaken by the United States.

(4) Subject to the terms and conditions hereinafter imposed, the project will be best adapted to a comprehensive plan for improving and developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes.

(5) The installed horsepower capacity of the project hereinafter authorized for the purpose of computing the capacity component of the administrative annual charge is 15,300 horsepower, and the amount of such charges, based upon such capacity, to be paid under the license for the purpose of reimbursing the United States for the costs of administration of Part I of the Act is reasonable as hereinafter fixed and specified.

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(6) The following described transmission facilities, while not included in the application for license, are parts of the project within the meaning of Section 3(11) of the Act and should be included in the license for the project as hereinafter provided:

(a) The 23 kv Norwood-Norfolk line, about 13 miles long;

(b) The 23 kv East Norfolk-Norfolk line, 4 miles long;

(c) The short Norfolk 2.4 kv underground cable;

(d) The Raymondville-Norfolk 115 kv line, 6.73 miles long; and

(e) The 23 kv substations at Norwood and East Norfolk and the 115 kv substation at Raymondville.

(7) The exhibits designated and described in paragraph (B) below conform to the Commission's rules and regulations and should be approved as part of the license for the project.

The Commission orders:

(A) This license is hereby issued to Niagara Mohawk Power Corporation (Licensee) of Syracuse, New York, under Section 4(e) of the Federal Power Act (Act) for a period effective as of November 1, 1949, and terminating December 31, 1993, for the continued operation and maintenance of Raquette River Project No. 2330, located on the Raquette River, a navigable water of the United States, subject to the terms and conditions of the Act, which is incorporated herein by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) Constructed Project No. 2330 consists of:

(i) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interests in such lands necessary or appropriate for the purposes of the project, whether such lands or interests therein are owned or held by the applicant or by the United States; such project area and project boundary being more specifically shown and described by certain exhibits which formed part of the application for license and which are designated and described as follows:

Exhibit J: (FPC No. 2330-1) Entitled, "Raquette River Project—General Location Map"

Exhibit K-1: (FPC No. 2330-2) Entitled, "Existing Norwood Development—Detail Map"

Exhibit K2: (FPC No. 2330-3) Entitled, "Existing East Norfolk Development — Detail Map"

Exhibit K-3: (FPC No. 2330-4) Entitled, "Existing Norfolk Development—Detail Map"

Exhibit K-4: (FPC No. 2330-5) Entitled, "Existing Raymondville Development — Detail Map."

(ii) Project works consisting of:

1. The Norwood development consisting of a concrete gravity type dam 23 feet high and 188 feet long, a 350 acre reservoir, a concrete intake structure, a concrete and masonry powerhouse containing a 2000 kw generating unit;

2. The East Norfolk development consisting of a concrete gravity type dam 16 feet high and 245 feet long, a 135 acre reservoir, an open steel flume and concrete intake structure, a concrete and masonry powerhouse containing a 3000 kw generating unit;

3. The Norfolk development consisting of a timber crib dam 20 feet high and 400 feet long, a ten acre reservoir, an open flume, a wood stave pipeline, a steel penstock with surge tank, a concrete powerhouse containing a 4500 kw generating unit; and

4. The Raymondville development consisting of a concrete dam 17 feet high and 293 feet long, a 50-acre reservoir, an open flume with a concrete intake struc-

ture, a concrete powerhouse containing 2000 kw generating unit;

and appurtenant hydraulic, mechanical, and electrical facilities and miscellaneous project works

the location, nature, and character of which structures are more specifically shown and described by the exhibits hereinbefore cited and by certain other

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exhibits which formed part of the application for license and which are designated and described as follows:

Exhibit L, sheet No. 1 (FPC No. 2330-6) entitled "Existing Norwood Development Plan, Elevation and Sections Dam, Intake and Powerhouse";

Exhibit L, sheet No. 2 (FPC No. 2330-7) entitled "Existing East Norfolk Development Plan, Elevation and Sections Dam, Intake and Powerhouse";

sheet No. 3 (FPC No. 2330-8) entitled "Existing Norfolk Development Plan, Elevation and Sections Dam, Intake, Surge Tank, and Powerhouse";

sheet No. 4 (FPC No. 2330-9) entitled "Existing Raymondville Development Plan, Elevation and Sections Dam, Intake and Powerhouse"; and

Exhibit M, consisting of 5 typewritten pages and 4 maps, entitled "General Descriptions and General Specifications of Mechanical, Electrical and Transmission Equipment and their Appurtenances", filed in the Commission December 14, 1962.

(iii) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(C) This license is also subject to the terms and conditions set forth in Form L-3 (Revised November 1, 1963), entitled "Terms and Conditions of License for Constructed Project Affecting Navigable

Waters of the United States." (30 FPC) which terms and conditions designated as Articles 1 through 27, are attached and made a part hereof except for Article 4 thereof; and subject to the following special conditions set forth herein as additional articles:

Article 28. The project, including its operation and maintenance and any work incident to additions or alterations authorized by the Commission whether or not conducted upon lands of the United States, shall be subject to the inspection and supervision of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him such information as he may require concerning the operation and maintenance of the project, and of any such alteration thereof, and shall notify him of the

date upon which work with respect to any alteration will begin, and as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. Licensee shall submit to said representative a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of any such alterations to the project. Construction of said alterations or any feature thereof shall not be initiated until the program of inspection for the alterations or any feature thereof has been approved by said representative. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties.

Article 29. The Licensee shall pay to the United States the following annual charge:

> For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, a reasonable annual charge as determined by the Commission in accordance with the provisions of its regulations, in effect from time to time. The authorized installed capacity for such purposes is 15,300 horsepower.

Article 30. The Licensee shall within one year from the date of issuance of the license, file with the Commission for approval its proposed recreational use plan for the project. The plan shall be

prepared after consulatation with appropriate Federal, State and local agencies, and shall include recreational im-

provements which may be provided by others in addition to the improvements the Licensee plans to provide.

Article 31. Whenever the licensee is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the licensee shall reimburse the owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission shall determine to be equitable, and shall pay to the United States for the cost of making such determination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States the licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the costs of making the determinations pursuant to the then current Commission Regulations under the Federal Power Act within 60 days from the date of rendition of a bill therefor and, upon failure to do so, shall thereafter be subject to the payment of the penalties specified in the then current Regulations. The Licensee shall have the right to pay such amounts under protest within the 60-day period and to reconsideration of the amounts billed or a hearing as provided by the then current Regulations under the Act.

Article 32. The Licensee shall, within one year from the date of issuance of this license, file in accordance with the rules and regulations of the Commission an application for inclusion in the project license of the following transmission facilities:

1. The 23 kv Norwood-Norfolk line, approximately 13 miles long.

2. The 23 kv East Norfolk-Norfolk line, 4 miles long.

3. The short Norfolk 2.4 kv underground cable.

4. The Raymondville-Norfolk 115 kv line, 6.73 miles long.

5. The 23 kv substations at Norwood and East Norfolk and the 115 kv substation at Raymondville.

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—Project No. 2330

(D) The exhibits designated and described in paragraph (B) above are hereby approved as part of this license.

(E) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313 (a) of the Act, and failure to file such an application shall constitute acceptance of this license. In acknowledgement of the acceptance of this license, it shall be signed for the licensee and returned to the Commission within 60 days from the date of issuance of this order.

By the Commission.

JOSEPH H. GUTRIDE,
Secretary.

Project No. 2330

* * * * * * * * * *

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[FPC Statement of Annual Charges, Project 2318, dated July 17, 1964, for Period April 1, 1949-December 31, 1963, has been printed at pages 16-17 of the Joint Appendix, *supra,* and is therefore not reprinted here.]

(879)

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Request for Reconsideration of Project 2318
Statement of Annual Charges

NIAGARA MOHAWK POWER CORPORATION
NIAGARA MOHAWK
300 Erie Boulevard West
Syracuse 2, N. Y.

August 11, 1964

Federal Power Commission
441 G Street, N. W.
Washington 25, D. C.

Re: Project No. 2318—Statement of Annual Charges

Gentlemen:

Niagara Mohawk Power Corporation requests rehearing or reconsideration of a Statement of Annual Charges for the Period April 1, 1949 through December 31, 1963, rendered under stamped date of July 17, 1964 to Niagara Mohawk by one D. L. Pearson, as Acting Chief, Budget and Financial Services, in the amount of $27,883.07.

Niagara Mohawk respectfully represents:

(1) Section 10(e) of the Federal Power Act does not by its terms, or by reasonable inference therefrom, authorize the Commission to make retroactive application of annual charges for the purpose of reimbursing the United States for the costs of the administration of Part I of the Act.

(2) Retroactive application of such annual charges constitutes a taking of property without due process of law in contravention of Amendment V to the Constitution of the United States.

(3) Retroactive application of such annual charges in respect of Project No. 2318 is arbitrary and unreasonably discriminatory.

(4) The license for Project No. 2318 does not by its terms in Article 21 thereof purport to fix annual charges on a retroactive basis.

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(5) Because the Commission, contrary to the representations set forth in Part II of its General Rules, has not determined or advised Niagara Mohawk, for each fiscal year, or portion thereof, for the period April 1, 1949—December 31, 1963, both inclusive, the cost of administration under Part I of the Federal Power Act reasonably chargeable to licensees, the statement of charges rendered is ineffective. Niagara Mohawk, as licensee of Project No. 2318, has not to date been advised what are the reasonable annual charges specified in Section 10(e) of the Act to it, assuming *arguendo* that such charges may be legally enforced retroactively for a period from date of issuance of license.

In support of its application, Niagara Mohawk submits the following observations:

In purporting to fix retroactively annual charges to licensees for administration of Part I of the Act, effective as of April 1, 1962, in respect of projects constructed prior to June 26, 1935, as set forth in Public Service Company of New Hampshire (27 FPC 830, 834), except in instances of prior findings of navigability, the Commission has acted arbitrarily and unreasonably in discriminating against projects not otherwise qualifying under the April 1, 1962 deadline. The incidence of a prior finding of navigability as opposed to failure by the Commission to make such finding is not a proper predicate for fixing the scope of application of annual charges. In fact, the Commission has noted, "We

find no basis, however, either in the language of the Act or its legislative history, for the conclusion that a river does not become 'navigable', or a license necessary, until the Commission or some other utility has so ruled" (28 FPC 830, 835).

Unlike the licenses issued to Public Service Company of New Hampshire (28 FPC 826, 829; 28 FPC 830, 838-9), the license for Project No. 2318 does not contain any date for "effectiveness" of the application of annual charges for the purpose of reimbursing the United States for the cost of administration of Part I of the Act. The necessary inference and reasonable interpretation of the license for Project No. 2318 is that charges are effective no earlier than April 1, 1962 or date of formal issuance of license to Niagara Mohawk.

Published data of the Commission contained in its annual reports to the Congress suggests that costs of actual administration by the Commission of Part I of the Act for the period April 1, 1949 to December 31, 1963 were more than recovered by collection from then existing licensees in an amount fixed by the Commission to reimburse United States therefor. The Commission's averment that "Unfortunately, the Commission

has lacked sufficient funds or man power to enforce general compliance" with Part I (28 FPC 830, 833) indicates only a lack of connection between charges for administration and availability of actual collections by the Federal Power Commission for that purpose (cf. First Annual Report of the Commission 176).

Niagara Mohawk is now the licensee, having filed license applications on and after April 1, 1962, of Projects 2318, 2320 and 2330 and has pending license applications under

projects designated 2424 and 2474. Niagara Mohawk is complying willingly and without question in response to the Commission's general declaration to holders of unlicensed projects issued in April 1962. Niagara Mohawk will in the future file additional applications for now unlicensed projects as soon as the necessary data can be assembled. Preparation of acceptable application for licenses is a time-consuming and costly operation.

Both the statute (Section 10(e)) specifying that "the Commission shall seek to avoid increasing the price to the consumer by such charges", and the Public Service Company of New Hampshire opinion indicating that "imposition of such charges might seriously deter potential applicants from coming forward to comply with the statute" suggest strongly at least, if not compellingly, the conclusion that any annual charge billing prior to April 1, 1962 is precluded and would be punitive in effect.

Narrow jurisdictional criteria of the Commission in application of licensing requirements have been progressively superseded culminating in the Public Service Company of New Hampshire decision in 1962. While the Commission may be of the opinion that owners of constructed hydro-electric projects have been slow to accept the license obligations that Part I of the Act entails, it is not unreasonable to suggest that the apparent present clear-cut requirement to license hydro-electric projects constructed prior to June 26, 1935, was not effectively brought home to such project owners prior to April 1, 1962.

By reason of the foregoing, Niagara Mohawk respectfully protests the assessment contained in said Statement of Annual Charges and requests (i) rehearing or reconsideration of the billing hereinabove referred to; (ii) that the Commission, upon such rehearing or reconsideration, modify its proposed annual charges to and including De-

cember 31, 1963, to confine such charges to application of the specific rates fixed in Project No. 2318 to the period April 1, 1962 to December 31, 1963 and thereafter on proper annual billings; and (iii) that imposition of penalty charges be waived for the period to and including final determination of this application.

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Please acknowledge receipt of this application to the undersigned.

Respectfully submitted,

NIAGARA MOHAWK POWER CORPORATION

By LAUMAN MARTIN
Vice President and General Counsel

1045

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: David S. Black, Acting Chairman; L. J. O'Connor, Jr., and Charles R. Ross.

Niagara Mohawk Power Corporation Project No. 2318

Order Granting Rehearing for Further Consideration

(Issued September 8, 1964)

On August 12, 1964, the Niagara Mohawk Power Corporation, licensee for the E. J. West project, Project No. 2318, on the Sacandaga River in New York, filed an application for rehearing of a statement of annual charges, dated July 17, 1964, for the period of April 1, 1949, through December 31, 1963, in the amount of $27,883.07. The Corporation contends that the Commission cannot assess such charges under the license for Project No. 2318.

The Commission finds:

It is appropriate and in the public interest in administering Part I of the Federal Power Act (16 U.S.C. 791-823), particularly subsection 10(e), that the Niagara Mohawk Power Corporation's aforesaid application for rehearing of the statement of annual charges dated July 17, 1964, be granted for purposes of further consideration.

The Commission orders:

The Niagara Mohawk Power Corporation's aforesaid application for rehearing of the statement of annual charges dated July 17, 1964, hereby is granted for purposes of further consideration.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary.

1053

Request for Reconsideration of Projects 2320, 2330, Statement of Annual Claims, Received November 20, 1964

NIAGARA MOHAWK POWER CORPORATION
NIAGARA MOHAWK
300 Erie Boulevard West
Syracuse 2, N.Y.

November 9, 1964

Federal Power Commission
441 G Street, N.W.
Washington, 25, D. C.

Re: Project Nos. 2320 and 2330—Statements of Annual Charges

Gentlemen:

Niagara Mohawk Power Corporation requests rehearing or reconsideration of Statements of Annual Charges for

the Period November 1, 1949 through December 31, 1963, in each instance, rendered under date of October 16, 1964 to Niagara Mohawk by one D. L. Pearson, Budget and Financial Services, in the respective amounts of $115,-437.13 and $30,938.85 for Project Nos. 2320 and 2330.

Niagara Mohawk respectfully represents:

(1) Section 10(e) of the Federal Power Act does not by its terms, or by reasonable inference therefrom, authorize the Commission to make retroactive application of annual charges for the purpose of reimbursing the United States for the costs of the administration of Part I of the Act.

(2) Retroactive application of such annual charges constitutes a taking of property without due process of law in contravention of Amendment V to the Constitution of the United States.

(3) Retroactive application of such annual charges in respect of Project Nos. 2320 and 2330 is arbitrary and unreasonably discriminatory.

(4) The licenses for Project Nos. 2320 and 2330 do not by their terms in respective Articles 29 thereof purport to fix annual charges on a retroactive basis.

(5) Because the Commission, contrary to the representations set forth in Part II of its General Rules, has not determined or advised Niagara

Mohawk for each fiscal year, or portion thereof, for the respective periods November 1, 1949—December 31, 1963, both inclusive, the cost of administration under Part I of the Federal Power Act reasonably chargeable to licensees, the statement of charges rendered is ineffective. Niagara Mohawk, as licensee of Project Nos. 2320 and 2330, has not

to date been advised what are the reasonable annual charges specified in Section 10(e) of the Act to it, assuming *arguendo* that such charges may be legally enforced retroactively for a period from date of issuance of license.

In support of its application, Niagara Mohawk submits the following observations:

In purporting to fix retroactively annual charges to licensees for administration of Part I of the Act, effective as of April 1, 1962, in respect of projects constructed prior to June 26, 1935, as set forth in Public Service Company of New Hampshire (27 FPC 830, 834), except in instances of prior findings of navigability, the Commission has acted arbitrarily and unreasonably in discriminating against projects not otherwise qualifying under the April 1, 1962 deadline. The incidence of a prior finding of navigability as opposed to failure by the Commission to make such finding is not a proper predicate for fixing the scope of application of annual charges. In fact, the Commission has noted, "We find no basis, however, either in the language of the Act or its legislative history, for the conclusion that a river does not become 'navigable', or a license necessary, until the Commission or some other utility has so ruled" (27 FPC 830, 835).

Unlike the licenses issued to Public Service Company of New Hampshire (27 FPC 826, 829; 27 FPC 830, 838-9), the licenses for Project Nos. 2320 and 2330 do not contain any date for "effectiveness" of the application of annual charges for the purpose of reimbursing the United States for the cost of administration of Part I of the Act. The necessary inference and reasonable interpretation of the licenses for Project Nos. 2320 and 2330 is that charges are effective no earlier than April 1, 1962 or respective dates of formal issuance of the licenses to Niagara Mohawk.

(1054)

Published data of the Commission contained in its annual reports to the Congress suggests that costs of actual administration by the Commission of Part I of the Act for the period November 1, 1949 to December 31, 1963 were more than recovered by collections from then existing licensees in an amount fixed by the Commission to reimburse United States therefor. The Commission's averment that "Unfortunately, the Commission has lacked sufficient funds or man power to enforce general compliance" with Part I (27 FPC 830, 833) indicates only a lack of connection between charges for administration and availability of actual collections by the Federal Power Commission for that purpose (cf. First Annual Report of the Commission 176).

1055

Niagara Mohawk is now the licensee, having filed license applications on and after April 1, 1962, of Projects 2318, 2320 and 2330 and has pending license applications under projects designated 2424, 2474 and 2482. Niagara Mohawk is complying willingly and without question in response to the Commission's general declaration to holders of unlicensed projects issued in April 1962. Niagara Mohawk will in the future file additional applications for now unlicensed projects as soon as the necessary data can be assembled. Preparation of acceptable applications for licenses is a time-consuming and costly operation.

Both the statute (Section 10(e)) specifying that "the Commission shall seek to avoid increasing the price to the consumer by such charges", and the Public Service Company of New Hampshire opinion indicating that "imposition of such charges might seriously deter potential applicants from coming forward to comply with the statute" suggest strongly at least, if not compellingly, the conclusion that any annual charge billing prior to April 1, 1962 is precluded and would be punitive in effect.

So far as Niagara Mohawk is informed, there has been no considerable expenditure for investigation or administration under the Federal Power Act with respect to Project Nos. 2320 and 2330. Cf. Carolina Aluminum Co., 19 FPC 704, 705.

Narrow jurisdictional criteria of the Commission in application of licensing requirements have been progressively superseded culminating in the Public Service Company of New Hampshire decision in 1962. While the Commission may be of the opinion that owners of constructed hydro-electric projects have been slow to accept the license obligations that Part I of the Act entails, it is not unreasonable to suggest that the apparent present clear-cut requirement to license hydro-electric projects constructed prior to June 26, 1935, was not effectively brought home to such project owners prior to April 1, 1962.

By reason of the foregoing, Niagara Mohawk respectfully protests the assessment contained in said Statements of Annual Charges and requests (i) rehearing or reconsideration of the billing hereinabove referred to; (ii) that the Commission, upon such rehearing or reconsideration, modify its proposed annual charges to and including December 31, 1963, to confine such charges to application of the specific rates fixed in Project Nos. 2320 and 2330 to the period April 1, 1962 to December 31, 1963 and thereafter on proper annual billings; and (iii) that imposition of penalty charges be waived for the period to and including final determination of this application.

1056

The Commission's attention is directed to its order issued September 8, 1964 in Project No. 2318 granting rehearing with respect to protested annual charges for that project.

Please acknowledge receipt of this application to the undersigned.

Respectfully submitted,

NIAGARA MOHAWK POWER CORPORATION
By: LAUMAN MARTIN
Vice President and General Counsel

1075

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, and David S. Black

Niagara Mohawk Power Corporation Project Nos. 2320 and 2330

Order Granting Rehearing for Further Consideration

(Issued December 4, 1964)

On November 10, 1964, the Niagara Mohawk Power Corporation, licensee for Project Nos. 2320 and 2330 filed an application for rehearing of a statement of annual charges, dated October 16, 1964 for the period of November 1, 1949 through December 31, 1963, in the amount of $115,437.13. The Corporation contends that the Commission cannot assess such charges under the license for Project Nos. 2320 and 2330.

The Commission finds:

It is appropriate and in the public interest in administering Part I of the Federal Power Act (16 U.S.C. 791-823), particularly subsection 10(e), that the Niagara Mohawk Power Corporation's aforesaid application for rehearing of the statement of annual charges dated October 16, 1964 be granted for purposes of further consideration.

The Commission orders:

The Niagara Mohawk Power Corporation's aforesaid application for rehearing of the statement of annual charges dated October 16, 1964 hereby is granted for purposes of further consideration.

By the Commission.
(S E A L)

JOSEPH H. GUTRIDE,
Secretary.

1078

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, and David S. Black.

Niagara Mohawk Power Corporation Project No. 2424

Order Issuing License (Major)

(Issued December 9, 1964)

Application was filed on November 8, 1963, by Niagara Mohawk Power Corporation (Applicant) of Syracuse, New York, for a license under Section 4 (e) of the Federal Power Act (Act) for constructed Project No. 2424, known as the Hydraulic Race Project, located on the Erie Canal which is a part of the New York State Barge Canal System in the City of Lockport, Niagara County, New York.

According to the application, the project was constructed in its present form in 1941 by a predecessor of Applicant. The latter acquired the project in 1950 through merger with the immediate predecessor-owner of the project works.

The Erie Canal, now called the New York State Barge Canal, is one of the Nation's earliest and greatest improvements for internal navigation. Though developed by the

State of New York and lying wholly within its borders, it has supported, from its inception, important traffic in interstate and foreign commerce through the port of New York. Under well established principles of navigability, the Erie Canal, as long ago as 1903, was declared by the Supreme Court to be a navigable water of the United States.[1] "When once found to be navigable, a waterway remains so."[2]

The Secretary of the Army and the Chief of Engineers have approved the plans of the project structures affecting navigation pursuant to Section 4(e) of the Act.

The Department of the Interior, in reporting on the application, advised that wildlife resources are not involved and the fishery resources of the project area are not significant. No conditions in the interest of the Department were recommended for inclusion in any license for the project.

The Department of Health, Education and Welfare has advised that the project has no significant effects on water supply quality, or vector control in the area, and none is expected.

1079

In accordance with the criteria set forth in our April 25, 1962 Opinion No. 357 (27 FPC 830), the license herein granted shall have an effective date of July 1, 1941 and a termination date of June 30, 1991.

The Commission finds:

(1) The project affects navigable waters of the United States.

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[1] See, Robert W. Parsons, 191 U.S. 17, 27 (1903).

[2] *United States* v. *Appalachian Electric Power Company*, 311 U.S. 377, 408 (1940).

(2) Applicant is a corporation organized under the laws of the State of New York, and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effectuate the purposes of a license for the project.

(3) Public notice of the filing of the application has been given. No protests or petitions to intervene have been received. No conflicting application is before the Commission.

(4) The project does not affect a Government dam, nor will the issuance of a license therefor, as hereinafter provided, affect the development of any water resources for public purposes which should be undertaken by the United States.

(5) Subject to the terms and conditions hereinafter imposed, the project will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes.

(6) The installed horsepower capacity of the project hereinafter authorized for the purpose of computing the capacity component of the administrative annual charge is 6,250 horsepower, and the amount of annual charges, based on such capacity, to be paid under the license for the project, for the costs of administration of Part I of the Act is reasonable.

(7) The exhibits designated and described in paragraph (B) below conform to the Commission's rules and regulations and should be approved as part of the license for the project.

(1079)

The Commission orders:

(A) This license is hereby issued to Niagara Mohawk Power Corporation (Licensee) of Syracuse, New York, under Section 4(e) of the

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Federal Power Act (Act), for a period of 50 years, effective as of July 1, 1941 and terminating June 30, 1991, for the continued operation and maintenance of the Hydraulic Race Project No. 2424, located on the Erie Canal, a part of the New York State Barge Canal, a navigable water of the United States, subject to the terms and conditions of the Act, which is incorporated herein by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) Project No. 2424 consists of:

(i) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by the Licensee or by the United States: such project area and project boundary being more specifically shown and described by the following exhibits which formed a part of the application for license.

Exhibit J: (FPC No. 2424-1) General Location Map

Exhibit K: (FPC No. 2424-2) Detail Map

(ii) A regulator tunnel owned by the State of New York takes water through a gate structure in the south canal wall above Lock No. 35, at Lockport. Applicant's 12.5-foot diameter tunnel connects with the State tunnel and con-

veys the water 140 feet to a steel penstock 13 feet in diameter and 99 feet long. The water passes through the single unit powerhouse, through a short tailrace, and back into the canal below Lock No. 34. The powerhouse contains one vertical type generating unit—a Kaplan turbine with adjustable blades directly connected to a generator rated at 4,687 kilowatts—and other mechanical and electrical appurtances, the location, nature, and character of which are more specifically shown and described by the exhibits hereinbefore cited and by certain other exhibits which also formed part of the application for license and which are designated and described as follows:

Exhibit L: General Design Drawings

Sheet 1 (FPC No. 2424-3) General Plan and Sections—Tunnel, Penstock and Tailrace

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Sheet 2 (FPC No. 2424-4) Plan and Sections—Powerhouse

Exhibit M: Consisting of 2 pages entitled "Hydraulic Race Project, General Descriptions and General Specifications of Mechanical, and Transmission Equipment and their Appurtances" filed in the Commission November 8, 1963.

(iii) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also, all riparian or

other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(C) This license is also subject to the terms and conditions set forth in Form L-3 (Revised August 1, 1964), entitled "Terms and Conditions of License for Constructed Project Affecting Navigable Waters of the United States," (30 FPC), which terms and conditions, designated as Articles 1 through 29, are attached hereto and made a part hereof, except for Articles 15, 16 and 25 thereof; and subject to the following special conditions set forth herein as additional articles:

Article 30. The Licensee shall pay to the United States the following annual charges, effective as of July 1, 1941:

> For the purpose of reimbursing the United States for costs of administration of Part I of the Act, a reasonable annual charge as determined by the Commission in accordance with the provisions of its regulations, in effect from time to time. The authorized installed capacity for such purpose is 6,250 horsepower.

Article 31. The Commission reserves the right to determine at a later date what transmission facilities, if any, shall be included in this license.

(D) The exhibits designated and described in paragraph (B) above are hereby approved as part of this license.

(E) This order shall become final 30 days from the date of its

issuance unless application for rehearing shall be filed as provided in Section 313 (a) of the Act, and failure to file

such an application shall constitute acceptance of this license. In acknowledgement of the acceptance of this license, it shall be signed for the licensee and returned to the Commission within 60 days from the date of issuance of this order.

By the Commission.

JOSEPH H. GUTRIDE,
Secretary

1109

Request for Recommendation of Order Issuing License (Major). Project 2424. Received January 7, 1965

NIAGARA MOHAWK POWER CORPORATION
NIAGARA MOHAWK
300 Erie Boulevard West
Syracuse 2, N. Y.

January 5, 1965

Federal Power Commission
441 G Street, N.W.
Washington, D.C. 20426

Re: Project No. 2424 (Hydraulic Race)—Order Issuing License, December 9, 1964

Gentlemen:

Niagara Mohawk Power Corporation hereby applies for rehearing or reconsideration in respect of the above-identified order, alleging it is aggrieved, as follows:

1. The order erroneously fixes 6,250 horsepower as rated capacity of the project whereas such 6,250 is the Kva applicable thereto. The correct capacity is 6,100 horsepower (Ex. M to application).

2. According to records of Niagara Mohawk's predecessor in ownership, the existing project went into initial com-

mercial operation January 29, 1942 and not 1941, or, more specifically, July 1, 1941, the dates adopted in said order.

3. The order fixes

(a) a purported effective date of license as July 1, 1941 (paragraph A);

(b) an indeterminable annual administration charge to be applicable from and after July 1, 1941 (Article 30); and

(c) by possible interpretation of Article 12, the requirement for establishment of an amortization

reserve pursuant to the requirements of Section 10(d) of the Act commencing July 1, 1961, a date more than three years prior to actual issuance of order authorizing license. In each instance the back-dating or retroactive application constitutes error to the detriment of Niagara Mohawk.

4. Assuming, *arguendo,* that administration charges can be lawfully imposed with retroactive effect, the Commission's order is defective in failing to specify the Commission's cost of administration for prior years and the necessity, if any, for Niagara Mohawk to make reimbursement.

If an annual administrative charge were applied to the project for the period January 29, 1942 through 1964, during which 451,421,900 kilowatt hours were generated by Project No. 2424, at the rate of one cent per horsepower year ($61) and two and one-half cents per 1,000 kilowatt hours generated (a commonly imposed formula in other licenses), Niagara Mohawk would be obligated to pay into the general funds of the United States the sum of $114,258.48 to reimburse the United States for presumed costs of administration which were never in fact incurred in any manner whatsoever insofar as administration of Project No. 2424 is concerned.

There is no justification for back-dating the tendered license for the purpose of collecting annual charges in prior years to reimburse the United States for costs of administration of the Act where, in fact, there has been no considerable expenditure for investigation or administration under the Act with respect to Niagara Mohawk's Hydraulic Race hydro-electric plant.

The total undepreciated actual legitimate original cost of said Project No. 2424 is calculated by Niagara Mohawk to be only $691,129.28 (Ex. N to application for license). Thus, the total administration charge potentially applicable under the tendered license is 15% of the total cost of the project.

Niagara Mohawk, since 1962, has undertaken wholeheartedly to seek licenses for all its hitherto unlicensed hydro-electric plants which, to the understanding of Niagara Mohawk, are subject to license under the

Commission's general announcement of licensing policy initially set forth in *Public Service Company of New Hampshire,* 27 FPC 830, issued April 25, 1962. Under its program Niagara Mohawk since April 1962 has received and accepted three licenses covering nine separate hydro-electric plants (Project Nos. 2318, 2320, 2330), has pending three more license applications (Project Nos. 2482, 2500, 2474) covering eleven separate hydro-electric plants and has in process of preparation three further license applications covering thirteen separate hydro-electric plants, all constructed prior to 1935. The foregoing representations indicate the cooperative attitude of Niagara Mohawk in the complex matter of licensing and also spell out the punitive impact of retroactive administration charges.

Niagara Mohawk respectfully alleges:

(a) The Commission lacks statutory power to back-date a license, thereby making the application of Part I of the Act retrospective, as proposed to be applied to Niagara Mohawk in the tendered license for Project No. 2424.

(b) The Commission lacks statutory power under Section 10(e) of the Act or under any statute to exact payments from a licensee as administration charges on a basis of retroactive application.

(c) The Commission lacks statutory power to issue a license such as that tendered for Project No. 2424 where the expiration of the first twenty years of operation under license for amortization reserve requirements under Section 10(d) of the Act is fixed at a date more than three years prior to issuance of license.

(d) The proposed terms of the tendered license involving the back-dating complained of are punitive, unlawful, arbitrary and unreasonably discriminatory and would effect a taking of Niagara Mohawk's property without due process of law in contravention of Amendment V to the Constitution of the United States.

Petitioner, Niagara Mohawk Power Corporation, therefore requests that rehearing or reconsideration of the order issuing license to petitioner's Project No. 2424, having issuance date December 9, 1964,

be granted and that upon such rehearing or reconsideration, said order be appropriately modified to fix rated capacity of Project No. 2424 at 6,100 horsepower, to fix effective date of said license at date of actual issuance, i.e., December 9, 1964, to fix annual administrative charges payable in respect of Project No. 2424 to commence from De-

cember 9, 1964, to fix unequivocally commencement of amortization reserve requirement under Section 10(d) of the Act applicable to Project No. 2424 at a date twenty years subsequent to December 9, 1964, and for such other and further relief as may be just and proper in the premises.

Respectfully submitted,

NIAGARA MOHAWK POWER CORPORATION

By LAUMAN MARTIN,
Vice President and
General Counsel

1114

Letter Correcting Request for Reconsideration of Order Issuing License (Major), Project 2424, Received January 18, 1965

NIAGARA MOHAWK POWER CORPORATION
NIAGARA MOHAWK
300 ERIE BOULEVARD WEST
SYRACUSE 2, N.Y.

January 14, 1965

Federal Power Commission
441 G Street, N.W.
Washington, D. C. 20426

Re: *Project No. 2424—Rehearing from License Order*

Gentlemen:

Under date of January 5, 1965, Niagara Mohawk applied for rehearing of the Commission's order issuing license for Project No. 2424 (Hydraulic Race).

Request is respectfully made that the Commission permit correction of the text of said application as follows:

(1114)

Page 2—line 19—Change "$114,258.48" to $12,688.55.

Page 2—lines 29-33—Delete entire paragraph.

The requested modifications reflect a required arithmetic change due to unfortunate misplacement of a decimal.

Except for the foregoing, Niagara Mohawk renews the representations made in its petition for rehearing dated January 5, 1965.

Respectfully submitted,

/s/ LAUMAN MARTIN
LAUMAN MARTIN
Vice President and
General Counsel

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, and David S. Black.

Niagara Mohawk Power Corporation) Project No. 2424

Order Granting Rehearing for Further Consideration

(Issued January 29, 1965)

On January 7, 1964, the Niagara Mohawk Power Corporation filed an application for rehearing of the order dated December 9, 1964, issuing a license for the constructed Hydraulic Race project, Project No. 2424, located on the New York State Barge Canal in New York. The Corporation alleges error respecting the dating of the license and the assessment of annual charges for administrative costs. It further contends that the order improperly states the project's rated capacity and the date of its initial commercial operation.

The Commission finds:

It is appropriate and in the public interest in administering Part I of the Federal Power Act (16 U.S.C. 791-823) that the Niagara Mohawk Power Corporation's aforesaid application for rehearing of the order, dated December 9, 1964, issuing a license for its constructed Hydraulic Race project be granted for purposes of further consideration.

The Commission orders:

The Niagara Mohawk Power Corporation's aforesaid application for rehearing hereby is granted for purposes of further consideration.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, and David S. Black.

Niagara Mohawk Power Corporation) Project Nos. 2318, 2320, 2330, 2424

Order Fixing Consolidated Hearing

(Issued March 4, 1965)

On August 12, 1964, Niagara Mohawk Power Corporation (Corporation), as licensee for constructed Project No. 2318, filed an application for rehearing of a statement of annual charges, dated July 17, 1964, for the period of April 1, 1949, through December 31, 1963. On November 10, 1964, the

Corporation, as licensee for constructed Project Nos. 2320 and 2330, filed an application for rehearing of a statement of annual charges, dated October 16, 1964, for the period of November 1, 1949, through December 31, 1963. On January 7, 1965, Corporation filed an application for rehearing of the order, dated December 9, 1964, issuing a license for its constructed Project No. 2424. Each of these applications alleges error respecting the assessment of annual charges for administrative costs under subsection 10(e) of the Federal Power Act (16 U.S.C. 803(e)), and the application in Project No. 2424 alleges error respecting certain other license conditions. By orders of September 8, 1964, December 4, 1964, and January 29, 1965, the Commission granted the above applications for rehearing.

The Commission finds:

It is desirable and in the public interest to consolidate these proceedings for purposes of hearing.

The Commission orders:

(A) A prehearing conference will be held on April 19, 1965 at 10 a.m. (EDST) in a hearing room of the Federal Power Commission, 441 G Street, N.W., Washington, D. C. 20426, before the Presiding Examiner.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by the Federal Power Act, particularly Sections 10(a), 10(e), and 308 thereof, and the Commission's Rules of Practice and Procedure, a public hearing shall be held

in a hearing room of the Federal Power Commission, 441 G Street, N.W., Washington, D. C. 20426, respecting the matters involved and the issues presented. The time for

the hearing is to be fixed by the Presiding Examiner following the prehearing conference.

By the Commission.
(SEAL)

JOSEPH H. GUTRIDE,
Secretary.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Niagara Mohawk Power Corporation) Project Nos. 2318, 2320, 2330, 2324

Presiding Examiner's Initial Decision Upon Authority of the Commission to Assign a Retroactive Effective Date to be Used in Fixing Obligations to Pay Annual Charges and To Set Up Amortization Reserves for Constructed Hydroelectric Projects.

(Issued July 12, 1965)

APPEARANCES

Lauman Martin, for Niagara Mohawk Power Corporation
George F. Bruder, for the Staff of the Federal Power Commission

HALL, Presiding Examiner: Niagara Mohawk Power Corporation (Niagara Mohawk) applied for, and the Commission issued, a license for each of the four hydroelectric projects involved in this proceeding, all of which had been constructed and maintained on navigable waters of the United States without the requisite federal authorization. The licenses issued for Projects 2318, 2320 and 2330 (constructed prior to the 1935 amendment of Section 23(b) of the Federal Power Act (Act)) have been accepted by Niagara Mohawk. However, the company has so far declined

to accept the license tendered for Project 2424 (constructed in its present form in 1941 in violation of Section 23(b)).

The dates of issuance of the licensing orders and the effective and termination dates of the licenses are:

Project	Date Of Licensing Order	Effective Date	Termination Date
2318	June 25, 1963	April 1, 1949	Dec. 31, 1993
2320	June 12, 1964	Nov. 1, 1949	Dec. 31, 1993
2330	June 15, 1964	Nov. 1, 1949	Dec. 31, 1993
2424	Dec. 9, 1964	July 1, 1941	June 30, 1991

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The significance of the effective date of each license (as distinguished from the date of the licensing order) is that such date controls Niagara Mohawk's obligation to pay annual charges and—after twenty years—to create amortization reserves.

Licenses, under Section 6 of the Act, are to be issued for not more than fifty years. They shall, under Sections 6 and 10, include as conditions, *inter alia*: (a) acceptance by the licensee of all the terms and conditions of the Act and such further conditions as the Commission shall prescribe in conformity with the Act (Section 6); (b) maintenance of amortization reserves by the licensee after the twentieth year of operation out of surplus accumulated in excess of a reasonable rate of return, the reserves to be applied in reduction of net investment should the project be taken at the expiration of the license (Section 10(d));[1]

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[1] The amortization reserve requirement, as explained by the Supreme Court, is as follows (*Federal Power Comm'n* v. *Niagara Mohawk Power Corp.*, 347 U.S. 329, 342): "Section 10(d) of the Act requires each licensee, after 20 years of operation under such a license, to establish and maintain amortization reserves out of any surplus thereafter earned and accumulated in excess of a reasonable return upon the licensee's net investment. Section 14 makes such net investment, plus severance damages a principle measure of the price the Government is to pay when and if it takes over all or part of the property. [Citing to a footnote in which the Court said, "In the instant case the Com-

and (c) payment by the licensee of reasonable annual charges to reimburse the United States for the cost of administration Section 10(e)).[2]

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To serve the purposes of the Act and to cause Niagara Mohawk to assume some of the obligations it would have borne had it obtained the licenses when it should have, the Commission, in prescribing the terms and conditions of each license, took into consideration the prior unlicensed construction and operation by, *inter alia,* (a) limiting the term of the licenses, and (b) imposing obligations to pay annual charges and set up amortization reserves based on the retroactive effective date of each license.

Contentions of Niagara Mohawk

For the projects covered by the three accepted licenses the Commission billed Niagara Mohawk a total of $174,259.05 for annual charges for administration for the 1949-1963 period. Niagara Mohawk contends that the accepted licenses do not by their terms require payment of annual

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mission explains that—'Section 10(d) is part of a larger pattern of fairness set up by the act to induce water-power development. Licensees are assured a 'fair return', but the public is safeguarded against profiteering by a licensee through profits beyond a fair return. At the end of the license period and upon 'recapture' by the Federal Government, earnings through the license period are to be tested against a fair return standard set up in section 3(13).' 9 F.P.C. at 248'']''

2 Section 10 ''All licenses issued under this Part shall be on the following conditions: * * * (e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part, * * and in fixing such charges the Commission shall seek to avoid increasing the price to the consumer of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require * *. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsquent period.

charges from retroactive effective dates but only call for the payment of such charges from the license order issuance dates, or, at the earliest, April 25, 1962 (date of the Commission's licensing opinion in *Public Service Company of New Hampshire,* 27 FPC 830, herein referred to as the *Androscoggin* decision, which enunciated the policy to be followed with respect to constructed hydroelectric projects. [3]

As to the license tendered for Project 2424, which has not yet been accepted, Niagara Mohawk contends that this license should be modified to indicate that its effective date for all purposes should be December 9, 1964, *i.e.,* the date of the licensing order, or in any event, no earlier than *Androscoggin* day—April 25, 1962.

The Examiner has determined that the arguments advanced by counsel for Niagara Mohawk, considered *infra,* pp. 10-22, do not warrant any change in the original license orders which reasonably imposed the license conditions here challenged.

Scope Of Review Available To The Examiner

This case presents for consideration the scope of review available to the Examiner—on rehearing ordered by the Commission—of the previously established and consistently adhered to policy announced in *Androscoggin,* that being a decision which the Act commits to the sound discretion of the Commission.

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In view of the right and duty of the Commission to establish what its policy should be as to projects constructed

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3 In *Androscoggin* the Commission considered a problem which had "perplexed the Commission for many years, *i.e.,* the appropriate license term to be accorded a project constructed prior to the 1935 amendments to the Act and operated thereafter in navigable waters without requisite federal authorization" (27 FPC at 832).

without federal authorization, the Examiner must accept the expressly declared policy set forth in *Androscoggin* as binding upon him, for neither an Examiner nor the courts may invade the domains of action reserved exclusively for the Commission. The Commission may, of course, change its policy at such time as circumstances and its statutory authority warrant. [4]

It may be observed in passing that it is possible to conceive of more than one method of dealing with unlicensed projects and the Commission undoubtedly considered several in arriving at its *Androscoggin* decision. But the Commission's action does not become suspect because in the opinion of others a method other than the one adopted by the Commission in *Androscoggin* would be preferable. The Commission may clearly adopt one method as opposed to another so long as the one adopted does not represent an abuse of discretion.

Proceedings Before The Commission

The applications for rehearing filed by Niagara Mohawk were consolidated for hearing by order of the Commission issued March 4, 1965. That order fixed April 19, 1965—later changed to April 20—as the date for prehearing conference.

The four licenses had been issued upon applications of Niagara Mohawk without an initial hearing. The consolidated rehearing record, consisting of an 82-page transcript, one exhibit and one item by reference, was made by stipulation between counsel for Niagara Mohawk and the Commission staff at the conference held April 20, 1965.

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[4] It should also be pointed out that the facts and circumstances to be considered by the Examiner are the same as those available for the Commission's consideration in issuing the licenses—on the basis of the applications and without hearing—to Niagara Mohawk. As the Supreme Court has said, "There must be a limit to individual argument in such matters if government is to go on" (*Bi-Metallic Investment Co.* v. *Colorado*, 239 U.S. 441, 445).

Main and reply briefs were filed on June 8 and 22, 1965, respectively.

Part I Of The Act

Part I of the Act vests in the Commission jurisdiction over the licensing, regulation and control of hydroelectric projects subjects to federal jurisdiction. It limits the term of licenses to not more than

fifty years and reserves to the United States the right of recapture at the end of the lease period. Upon expiration of the franchises the Government has the option of (1) taking over the license upon payment of the net investment not to exceed fair value, plus reasonable severance damages; (2) renewing the old license; or (3) granting a new one. That is to say, Part I "proceeds upon the theory of private development with ultimate public ownership possible. (S. Rep. No. 180, 66th Cong., Ist Sess., p. 3).

With the establishment of the Commission in 1920 it was no longer necessary for Congress to consider each project separately and enact special legislation in granting the consent of Congress, where appropriate, to construct and operate individual projects. Under the Act, once the Commission's jurisdiction to issue a license is determined, the only questions remaining are whether a license should issue. and, if so, the conditions under which it should be issued, the intent of the Act being to assure, through the imposition of appropriate conditions, the accomplishment of its purposes.

1935 Amendment To Section 23(b) Of The Act

In 1935 the original Federal Water Power Act of June 10, 1920—which had created the Commission—was generally revised and perfected and made Part I of the present Act.

Among other things, the 1935 amendements changed Section 23(b) to make it unlawful for any person for the purpose of developing electric power to construct, operate, or maintain any dam across or in any navigable waters of the United States "except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this act."[5] As stated in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Comm'n,* 328 U.S. 152, 172, n. 17, the 1935 amendments, *inter alia,* changed Section 23(b) so—

> * * * as expressly to require a federal license for every water power project in the navigable waters of the United States. It also made mandatory, instead of discretionary, the filing . . . of a declaration of intention by anyone intending to construct a project in non-navigable waters over which Congress had jurisdiction under its authority to regulate commerce.

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In *Androscoggin* the Commission emphasized the fact that "any uncertainty there might have been as to the legal status of an unlicensed power project occuping a navigable stream vanished with the adoption of Section 23(b) in 1935. From that point on, if not earlier, a license from this Commission was clearly mandatory. Unfortunately, the Commission has lacked sufficient funds or man power to enforce general compliance with the statute * *." (27 FPC at 833)

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5 The reference in Section 23(b) to "a permit or valid existing right-of-way granted prior to June 10, 1920," is to those granted under federal, not state, law. *Niagara Falls Power Co.* v. *Federal Power Comm'n,* 137 F2d 787, cert. den. 320 U.S. 792.*Wisconsin Public Service Corp.* v. *Federal Power Comm'n* 147 F.2d 743, cert. den. 325 U.S. 880. See also *United States* v. *Appalachian Power Co.,* 311 U.S. 377, 428-29; *First Iowa Hydro-Electric Cooperative* v. *Federal Power Comm'n,* 328 U.S. 152.

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Application Of Androscoggin Criteria To Licenses Issued To Niagara Mohawk

As previously mentioned the Commission in 1963 and 1964 issued licenses for Niagara Mohawk's four projects. Three of those projects (2318, 2320 and 2330) were pre-1935 and one (2424) was constructed after 1935.

In *Androscoggin* the Commission fixed the effective date of the license for that pre-1935 project at July 1, 1958, that being the first day of the month in which the Commission had held the Androscoggin River to be a navigable water of the United States.[6] Each of the licenses issued to Niagara Mohawk recites that its effective date was fixed in "accordance with the criteria set forth in" *Androscoggin.*

Niagara Mohawk's Project 2318 is located on the Scandaga River. Its Projects 2320 and 2330 are located on the Raquette River. The licenses for these projects were made effective from the first day of the month in which the Commission had determined these rivers to be navigable waters (8 FPC 231, 390).

The other Niagara Mohawk project (2424) was constructed in its present form in 1941 on the Erie Canal (now known as the New York State Barge Canal) by the company's predecessor. The license for this development was made effective July 1, 1941, that being the approximate date when construction was initiated. In *Androscoggin* the Commission explained (27 FPC at 834) that—

> * * * if Applicant, subsequent to 1935, had built an entirely new project without securing the requisite

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6 The project involved in *Androscoggin* had been constructed on the Androscoggin River in 1894, with various parts thereof being replaced and some added at various times—1903, 1909, 1917, 1923, 1927, 1928, 1937 and 1958-59 (27 FPC at 832) Public Service Company of New Hampshire acquired the project in 1943 and applied for a license in 1960 after the Commission, in another proceeding involving the Androscoggin River had found that the river was a navigable water of the United States on the basis of the transportation of logs and other forest products.

> authorization, we would not hesitate to adopt the date of such construction as the effective date of its license. We see no reason for different treatment merely because the unauthorized construction took the form of a replacement of an existing facility. * * *

In *Androscoggin* the Commission discussed three principal factors to be taken into account in licensing constructed projects.

(1) The first was that persons who continued to maintain and operate existing projects after the 1935 amendment of Section 23(b) without obtaining a license should not be rewarded for their failure to timely apply for licenses (27 FPC at 833):

> * * * If a company whose project has enjoyed three or more decades of unregulated operation were granted a full 50-year license term from date of issuance, it would reap a substantial windfall from its prolonged delay in filing. Equally important, it would obtain an unmerited advantage over those companies which complied at an earlier date, inasmuch as projects of the latter will be subject to recapture well within the next 50 years. To the extent feasible, it is the burden of sound licensing policy to minimize such inequities.

(2) On the other hand, the Commission determined not to adopt a harsh policy as to pre-1935 projects but one recognizing that the full extent of its jurisdiction had not always been understood (27 FPC at 833-34).

(3) In fixing the effective date of the *Androscoggin* license at July 1, 1958, when the Commission had first held the Androscoggin River to be a navigable water of the United States, the Commission took into account as a third factor the possible effect of backdating the license on the

incentive of other owners of unlicensed projects to apply for licenses (27 FPC at 834):

> In deciding not to impose retrospective charges for the period prior to July 1, 1958, we have given some weight to the possibility that imposition of such charges might seriously deter potential applicants from coming forward to comply with the statute. If, however, our experience during the next twelve months indicates that voluntary cooperation will in any event not be forthcoming, we may well wish to reconsider the position we now take on the question of backdating.

But the considerations which support the Commission's policy of leniency with respect to setting the effective date for pre-1935 projects are not controlling with respect to projects, such as Niagara Mohawk's Project 2424, constructed after 1935. For as the Commission expressly stated in *Androscoggin* (27 FPC at 832, n. 2):

> The construction of any project works *subsequent* to the enactment of Section 23(b) of the Act of 1935 without the concurrent filing of a license application or declaration of intention plainly violates that section. There is little room for dispute that licenses for such projects should be made effective not later than the date of construction of such project works.

The Commission's approach to the licensing of the pre-1935 projects, insofar as it differs from the policy with respect to post-1935 projects, appears to reflect its awareness of the distinction between lawful conduct and unlawful conduct. As to the pre-1935 projects the Commission assumes in the owner's favor, that the owner had been reasonable in all its conduct in constructing and operating its unlicensed project, and that it would therefore be an improper penalty to require a license effective as of the date of construction. But as the Commission's staff observed

in their court brief in the recent *Central Main* case discussed *infra*, p. 11, "anyone seeking to construct a project * * *after* 1935 was plainly required to seek and obtain Commission authorization, either by license or by a finding that the project did not affect the interests of interstate or foreign commerce. A person in this position could not lawfully remain silent while proceeding with construction, operation, and maintenance of his project. For those who followed such a course of action, the Commission's policy seeks to remedy the violation of Section 23(b) by conditioning the license so as to treat the project as though it had been constructed in compliance with the Act."

As the foregoing makes clear, the Commission, in licensing Niagara Mohawk's four hydroelectric projects, adhered to its *Androscoggin* criteria. Nothing in the record or in the decisions of the Courts justify Niagara Mohawks' undertaking to nullify that criteria. In this connection it seems appropriate to quote the words of the Court in *Portland General Electric Co.* v. *Federal Power Comm'n,* 328 F.2d 165, 173:

> * * * In applying for a major license * * *, petitioners seek rights they do not now have. In order to gain those rights they must accept the license upon such terms as Congress has determined should be imposed in the public interest. See *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377,

> 427-428, 61 S. Ct. 291, 85 L. Ed. 243, *Fox River Paper Co.* v. *Railroad Comm. of Wisconsin,* 274 U.S. 651, 656-657, 47 S. Ct. 669, 71 L. Ed. 1279. It is not a taking for the Government to withhold a benefit it is not contractually or constitutionally obligated to confer. Nor is it a taking for the Government to impose financial obligations upon the recipient of a benefit if, as here, the benefit may be declined.

Commission's Backdating Authority

Reference has been made to the fact that the statutory provision with respect to the term of the license is found in Section 6, with respect to annual charges in Section 10(e), and with respect to amortization reserves in Section 10 (d). But there is no section specifically governing the effective date of the license, the Commission's power in this respect being found in (1) Section 10(g) which authorizes the Commission to impose, as a condition for obtaining a license, "such further conditions not inconsistent with the provisions of this Act as the Commission may require," and (2) Section 309 of Part III of the Act (which also relates to licensees) which expressly confers upon the Commission broad power "to perform any and all acts * * it may find necessary or appropriate to carry out the provisions of this Act." The provisions of Section 309 are identical to those of Section 16 of the Natural Gas Act considered in *Public Service Commission of the State of New York* v. *Federal Power Comm'n*, 327 F.2d 893, 897, where the court points out that....

> All authority of the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation. While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail. * * *

While instances abound in which the Commission has backdated or otherwise limited the license term and imposed obligations to pay annual charges and set up amortization reserves based on the effective date of the license, its authority so to do has rarely been challenged in the courts. The challenges made have been unsuccessful insofar as the questions here raised are concerned.

The court cases now to be reviewed, together with the statutory authority contained in Section 6 and 309 of the Act, clearly show the lack of merit to Niagara Mohawk's contention that the Commission erred in assigning retroactive effective dates to be used in fixing its obligations to pay annual charges and set up amortization reserves.

In *Montana Power Corp,* v. *Federal Power Comm'n,* 330 F.2d 781, 788-9, the court upheld the Commission's order fixing a term of seven years for a license for a project constructed prior to June 10, 1920, saying:

> * * * Section 6 * * * provides that the term of a license is within the sound discretion of the Commission. In our opinion it has not been shown that the Commission abused its discretion in fixing the term * * *

Metropolitan Edison Co. v. *Federal Power Comm'n,* 169 F.2d 719, like the instant proceeding, involved a project where the construction, operation and maintenance of a project were originally not legally authorized. The court upheld the issuance of a license on November 7, 1944, backdated to January 1, 1938, and terminating June 30, 1970 (*i.e.,* 50 years after the enactment of the Federal Water Power Act in 1920). The project had been constructed in 1904 but application for license was not made until 1942. Among the conditions attached to the *Metropolitan Edison* license were conditions like those involved here—one requiring the payment of annual charges "starting January 1, 1938, for purposes of reimbursing the United States for the costs of administration of Part I of the Act," and another requiring the establishment of an amortization reserve after the first twenty years of operation under the license "namely after December 31, 1957."[7] The retroactive effective date and the 1970 termination date (which

7 The Commission's order setting forth the license terms is not reported but may be officially noticed by the Examiner.

resulted in an actual license period of approximately 26 years) were not challenged on appeal. Nor did the company object to the retroactive imposition of annual charges or to the 1938 starting date utilized in computing the first twenty years of operation under the license.

In *Metropolitan Edison* the court recognized that the Commission was not required to allow the company to enjoy a more favorable regulatory position by reason of its failure to obtain a license at the time of the passage of the Water Power Act in 1920. In affirming the Commission's order the court explained (169 F.2d at 723-24):

> It is clear from the Act that Congress contemplated the licensing of new projects: see Section 3(13); and of old projects in existence under permit; see Section 23(a). Congress must also have had in mind the fact that there were many projects already in existence, not under permit. We think it was the Congressional intent by the enactment of Section 10(g) to give to the Commission wide latitude and discretion in the performance of its licensing and regulatory functions and that Congress must have contemplated the licensing by the Commission of old projects, * * * not under permit, under the provisions of Section 10(g). We think it is clear that the conditions of Paragraph (A) (viii) are not inconsistent with the Federal Power Act, are not in the least arbitrary or unreasonable, and that therefore the Commission possessed the authority to impose them on Metropolitan. * * *
>
> * * * We may not conclude that an existing project, not under permit, should be put in a better position as to value for regulatory purposes under a federal license than an existing project under permit. * * * The Act must receive a practical construction, one which will enable the Commission to perform the duties required of it by Congress. See *Clarion River Power Co.* v. *Smith*, 61 App. D. C. 186, 59 F.2d 861, 863. We think that Section 10(g) authorized the Commission to impose the formula * * * and we so rule.

The most recent court decision is *Central Maine Power Co.* v. *Federal Power Comm'n,* F.2d (CA 1, No. 6431, May 18, 1935). In this case the Court upheld the issuance of a license retroactively dated January 1, 1938 (the project having been constructed without a license in 1937), and expiring December 31, 1978. The effect of the Commission order was to shorten the maximum 50-year term to an effective term of 24 years and, like the conditions involved in the instant proceeding and in *Metropolitan Edison, supra,* to impose retroactively requirements for the payment of annual charges for the purpose of reimbursing the United States for the cost of administration and for the establishment of an amortization reserve after the twentieth year of operation. Central Maine contended—

> * * * that it has been discriminated against because if it had constructed its plant prior to 1935 no such retroactivity, admittedly, see * * * [the Commission's *Androscoggin* opinion] * * * would have been imposed upon it. The Commission's response is that in 1937

> petitioner knew, or should have known, that it was obliged to apply for a license forthwith, or, at least file a declaration of intention to build, and that, under the cited case, all parties who neglected to do what they reasonably should have done were properly treated by having retroactivity imposed upon them.

The Court ruled that—

> * * * it is neither discriminatory nor a true penalty for the Commission to treat petitioner in the terms of its license as it would have treated it * * * had it complied with the statute when it should have. It is a familiar principle of equity itself to regard as being done that which should have been done. Any possible discrimination would be the other way. Were petitioner to prevail, parties * * * who had complied with the law would be worse off than those who did not.

The Licenses For Projects 2318, 2320 and 2330 By Their Terms Provide For Retroactive Imposition Of Annual Charges

As the following excerpt from the order issuing license for Project 2318, which is typical of the others, clearly demonstrates, Niagara Mohawk's contention that the three accepted licenses do not prescribe payment of administrative charges prior to the date of license issuance will not stand analysis:[8]

> * * * In accordance with the criteria set forth in * * * [Androscoggin] * * * we are making the effective date of this license April 1, 1949 * * *.
>
> * * * * * * * * * * *
>
> *The Commission orders:*
>
> (A) This license is hereby issued to Niagara Mohawk * * * for a period effective as of April 1, 1949 * * * for the continued operation and maintenance of Project No. 2318 * * *.

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8 Niagara Mohawk's argument is based on a divergence in the wording of its licenses from the wording in the license issued in *Androscoggin* (and, incidently, also in the wording for Niagara Mohawk's Project 2424). The article of the Androscoggin license relating to annual charges reads in pertinent part (27 FPC at 838):

> *Article 18*:The Licensee shall pay to the United States the following annual charges, effective as of July 1, 1958 * * *.

The parallel provision of the license for Projects 2318, 2320 and 2330 deletes the phrase "effective as of [date]." Niagara Mohawk contends that this deletion indicates the Commission's intention to waive the payment of annual charges for the retroactive period of the license. But Niagara Mohawk cannot ignore the clear unassailable language of paragraph (A) of the licensing orders with which it is also acquainted. These licenses, like statutes, are to be construed in their entirety, not in isolated parts. Repetition of the effective date in any article, in addition to the initial ordering clauses could only have served the unnecessary purpose of emphasis. In this connection it is of interest to also point out that the Niagara Mohawk applications for license were filed after, and pursuant to the invitation contained in, *Androscoggin* which made plain the significance of effective dates of licenses: "Applicant would be liable for annual charges commencing on such date and would be required [twenty years thereafter] to establish amortization reserves provided for in Section 10(d) of the Act" (27 FPC at 834).

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Not only does paragraph (A) of the ordering clause of each of the license orders expressly make the license retroactively effective from a stated date, but each license also contains an article specifying the method for fixing annual charges (Article 21 for Project 2318; Article 20 for Projects 2320 and 2330).

Whether the licenses for Projects 2318, 2320 and 2330 provide for retroactive imposition of annual charges depends upon their terms. From a review of the terms of these licenses, the Examiner is unable to see how the answer could possibly be otherwise than in the affirmative. The terms of these licenses are intended to, and do, carry to completion the statutory duty of causing Niagara Mohawk to contribute to the costs of administration. Sharing in the costs of administration from the effective date of a license is an obligation which no licensee should be permitted to shirk.

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Niagara Mohawk's Contention That The Commission's Statements Of Administrative Charges Are Not Supported By The Cost Determination Criteria Of Part 11 Of The Commission's Regulations

As shown *supra,* p. 2, n. 2, Section 10(e) of the Act obligates a licensee to pay a reasonable annual charge to the United States in amounts to be fixed by the Commission to reimburse the United States "for the costs of the administration" of Part I of the Act. It permits the Commission to adjust charges from time to time "as conditions may require." Part 11.20 of the Regulations, which proceeds upon the assumption that all projects subject to the Commission's jurisdiction are under license and will share in administrative costs, states that "a determination shall be made for each fiscal year of the costs of administration of Part I of the * * Act chargeable of such licensees," *i.e.,*

other than State or municipal licensees, and of more than 2000 horsepower installed capacity.

Niagara Mohawk received statements of annual charges for Projects 2318, 2320 and 2330 aggregating $174,259.05. It argues that even if retroactive charges can be imposed, the statements it received "are not supported by the required 'determination * * * for each fiscal year of the costs of administration of Part I' of the Act required in Part 11.20 of the Regulations"; that in the absence of such a showing, "the statements presented with respect to Projects 2318, 2320 and 2330 are not enforceable or collectable bills."

Staff counsel is of the view that the supporting information sought by Niagara Mohawk is not material to the resolution of the issues in this case. He contends that the court in the *Central Maine* case (*supra,* pp. 11-12) made it clear that a prime objective of backdating licenses is to prevent, insofar as possible, those who have violated the Act from enjoying a better position than those who timely complied. He further points out that the Commission, by its Orders 272 and 272-A, amended its regulations in 1963 for the express purpose of increasing annual charges to cover administrative costs;[9] that for reasons developed in Order 272-A annual charges even now do not cover all administrative costs.

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The Commission is faced here, as it has been on other occasions, with the licensing of projects constructed and maintained without the requisite federal authority. Such cases cause the Commission to adjust its administrative machinery and actions to the necessity of dealing with such

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9 These orders were issued in Docket R-228 on November 20, 1963, and June 18, 1964, respectively. The notice of proposed rule-making in this docket, issued on December 28, 1962, indicates that for the years 1960 through 1962 the Commission's collection fell short of its cost by $854,785.

projects so as to (1) enable their continued operation in compliance with the law, and (2) keep those who ignored the law from obtaining unmerited advantage over those who complied therewith. In meeting this responsibility the Commission has, with court approval, *supra,* pp. 10-12, considered it just and reasonable to, *inter alia,* to impose annual charges from and after the retroactive effective date of a license. In this connection it recognized that it "may make the pragmatic adjustments called for by particular circumstances," *Federal Power Comm'n* v. *Natural Gas Pipeline Company of America,* 315 U.S. 575, 586, because this harmonizes with the purposes of the Act.

The only practical and reasonable procedure that the Commission can follow in assessing annual charges is to provide, as it has a formula to be uniformly applied to all licensees. It hopes that the formula will reimburse the United States for the costs of administration which vary from year to year. When the formula devised does not meet this objective, the costs not recovered from licensees must be paid for out of annual appropriations by Congress.

Congress clearly intended that the owners of all hydroelectric projects subject to the Commission's jurisdiction would share proportionately in the Commission's costs of administration and this is what the regulations also contemplate. Here instead of following the procedure for obtaining licenses and paying annual charges on a current basis, Niagara Mohawk rather tries to utilize a violation of the Act so as to nullify the annual charge requirement (Cf. *Pennsylvania Water & Power Co.* v. *Federal Power Comm'n,* 343 U.S. 414, 424). It cannot be permitted to succeed in this attempt. Compliance with the annual charge requirement is part of "the price which [Niagara Mohawk] must pay to secure the right to maintain" its projects (*United States* v. *Appalachian Electric Power Co.,* 311 U.S. 377, 427-28). The "bite of the law is in its enforcement", *Fisher* v. *United States,* 328 U.S. 463, 484.

In fairness to those who have timely complied with the law and paid annual charges according to the Commission's formula, and in order to avoid discriminating against non-violators in favor of violators, the Commission must cause violators to pay annual charges on the same basis on which the non-violators were assessed. If it can thereafter be determined that the aggregate amount assessed exceeds the total of the Commission's costs of administration to a significant degree, then all licensees would seem to be entitled to recoup a proportionate part

of the overpayment. Section 10(e) so provides (see *supra,* p. 2, n. 2). By way of contrast to what the statute requires, Niagara Mohawk is here in effect seeking a determination of Commission costs of administration for the 1949-1963 period upon the chance that it might disclose that the Commission has already recouped its costs for that period, thereby making any assessment against Niagara Mohawk unjustified. But since Niagara Mohawk must pay its fair share of such costs no matter what the situation is with respect to past reimbursements, the Examiner concludes that Niagara Mohawk's contention that the Commission, as a condition of retroactively imposing annual charges, must at least show that it has not fully recovered its administrative costs for the past period of the licenses, is wholly untenable.

Niagara Mohawk is also clearly in error in claiming that "Prior to actual license issuance there is no cost to the United States in having the Commission administer the statutory responsibilties incumbent on it by Part I of the Act." Under this approach, and contrary to the intent of the Act, the cost of dealing with the non-compliance problem and processing license applications up to the date of issuance of the licensing order would go unreimbursed.

Niagara Mohawk's delay in complying with the law cannot be said to have lightened the Commission's administrative burden or expense in administering Part I of the Act. Nor has it in any equitable sense entitled Niagara Mohawk to the relief it here seeks. It is common knowledge much of the Commission's administrative costs are attributable to the entire non-compliance problem, including Niagara Mohawk's projects.

Furthermore, Niagara Mohawk's argument that its projects have not occasioned administrative costs for the years 1949-1963, for which the amount of $174,259.05 was assessed under Section 10(e), ignores the fact that the Commission's formula for determining annual charges does not attempt to relate specific expenses to specific licensees. Instead, the total administrative expenses are apportioned each year among all licensees. The end result is that one licensee reimburses the Commission for expenses caused by other licensees in a particular year. Over the long run, however, the variations should tend to balance out.

Niagara Mohawk calls attention to the fact that Section 10(e) directs that "in fixing such charges, the Commission shall seek to avoid increasing the price to the consumers of power by such charges." It says that the "Levy of retroactive charges for 16 or 24 years on a licensed project does not smack of such avoidance." While Niagara Mohawk is obligated to pay the annual charges even if they result in a rate increase, there is no apparent reason why a rate increase will occur. Niagara Mohawk is one of the largest utilities in the country. Accordingly, in view of its vast sales and revenues, it is wholly

unreasonable to believe that the assessed charges, which by comparison with its total revenues are indeed minuscule in amount, could justify a rate increase. That is to say, Niagara

Mohawk is unquestionably in a position to absorb the annual charges without increasing its rates.

Niagara Mohawk's Predecessor Was Unreasonable And Recalcitrant In Not Filing A Declaration Of Intention For Project 2424

Niagara Mohawk next contends that its predecessor in interest was excused from filing a declaration of intention for Project 2424 because this project is "the successor user at Lockport, New York, of water excepted from licensing by the Commission in a proceeding [Project 15] in 1926."

The Project 15 license authorized the diversion, for the purpose of producing hydroelectric power, of 275 cfs of water from the Niagara River through the New York State Barge Canal (formerly known as the Erie Canal) into Eighteen Mile Creek. Article 1 of that license, upon which Niagara Mohawk relies, is quoted in the margin. [10]

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10 Article 1 of the Project 15 license reads as follows:

> The authority to divert, carry, redivert and use the aforesaid 275 cubic feet per second, is limited to the place, amount, manner and agencies of diversion, carriage, rediversion and use described here: *Provided*, however, that nothing contained herein shall be construed as affecting the rights of the said Hydraulic Race Company to use of the so-called 'Surplus waters' of said Barge Canal to be taken and drawn from said canal at the head of the locks in the city of Lockport and to be discharged into the lower level of said canal, under the terms of a certain indenture between Richard Kennedy and Junius H. Hatch and the Canal Commissioners of the State of New York executed on January 25, 1826, and known as the 'Kennedy and Hatch' lease, or any modifications thereof, or under other lease or agreement now existing or hereafter made with the State of New York respecting such surplus waters; and any such surplus may be used either separately or in connection with the waters herein authorized to be diverted: *Provided, further*, that the carriage of the waters herein authorized to be diverted, or of any part thereof, and the time, place, amount and manner of the rediversion thereof from said Barge Canal, shall be wholly within the option of the State of New York, as expressed in the State permit, or in any renewal or amendment thereof, or otherwise; and that neither this license nor the authority granted hereunder shall be deemed to place any obligation whatsoever upon the State of New York with respect to the carriage or rediversion of said water.

Apparently Project 2424, for which Niagara Mohawk has not accepted the license tendered by the Commission, uses waters under the Kennedy and Hatch lease referred to in Article 1. In Niagara Mohawk's view, this article recognizes that any project using such water does not require a license. In disagreeing with Niagara Mohawk's position, staff counsel points out, among other things, that if Niagara Mohawk construed the language of Article 1 to have the meaning now attributed to it "it is difficult to understand why Niagara Mohawk applied for a license for" Project 2424 in 1963. In other words, the filing of the application for license was, in effect, an admission that the company was fully aware of the fact that the Act required a license for this development.

Assuming, however, that the language of Article 1 purported to exempt the canal water from the Commission's licensing authority, that action can be of no help to Niagara Mohawk for the Supreme Court, in 1903, had declared the canal to be a navigable water of the United States (*The Robert W. Parsons,* 191 U.S. 17, 27) and the Commission could not ignore or attempt to override that decision. "When once found to be navigable, a waterway remains so," *United States* v. *Appalachian Electric Power Co.,* 311 U.S. 377, 408 (1940). Equally applicable in this situation is the holding in *United States* v. *City and County of San Francisco,* 310 U.S. 16, 31-32 (1940), for the Commission's licensing authority insofar as navigable waters are concerned has never been in doubt:

> A substantial part of the City's argument rests upon its claim that the Department of the Interior in the period from 1913 to 1937 construed §6 to forbid no more than sale of power for resale. We are asked to accept these administrative interpretations. And in addition the City suggests that conduct of the Department. of which these interpretations were a part, is sufficient

to create an estoppel against the Government. Whether the Department at any time ever did more than merely to tolerate sale and distribution of Hetch-Hetchy power by the Company as a temporary expedient is doubtful. Certain it is, however, that in 1935 the Secretary of the Interior declared the City's disposition of power through the Company to be a violation of § 6, demanded discontinuance of this violation without success and thereafter instigated this proceeding. We cannot accept the contention that administrative rulings—such as those here relied on—can

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thwart the plain purpose of a valid law. As to estoppel, it is enough to repeat that ". . . the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit" [Citing *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 409].

As put in *Securities and Exchange Comm'n* v. *Morgan, Lewis, and Bockius, et al.*, 209 F.2d 44, 49, "the Commission may not waive the requirement of an act of Congress nor may the doctrine of estoppel be invoked against the Commission." Indeed the Commission recognized in *Androscoggin* that the applicant there involved could not rely upon "decisions rendered on the basis of the outmoded criteria of the 1920's" (27 FPC at 835-36). The Examiner should hasten to add, however, that the Supreme Court's 1903 determination of navigability in *The Robert W. Parsons* case does not constitute part of the "outmoded criteria" referred to by the Commission in *Androscoggin.*

In the circumstances, the Examiner disagrees with the contention of counsel for Niagara Mohawk that the company's "predecessor was neither unreasonable or recalcitrant in not filing a declaration of intention." The Examiner's view coincides with the Commission's view in the *Central Maine* case, as to which the Court found that it could

not "possibly condemn the Commission's determination that petitioner was unreasonable, if not even recalcitrant, in not recognizing and complying with the second portion of the statute by filing a declaration of intention."

License Issued To New York State Electric & Gas Corporation For Project 2438

Niagara Mohawk makes a forceful argument in contending that its Project 2424 is entitled at least to treatment, as respects administrative charges, equivalent to that accorded Project 2438 of New York State Electric & Gas Corporation (New York State Electric) the latter project being constructed without a federal permit in 1915 and 1917 on what is now known as the New York State Barge Canal, the Supreme Court having declared the canal to be a navigable water of the United States in 1903. As has already been pointed out (*supra,* pp. 17-18), Niagara Mohawk's Project 2424 is located on this same canal.

New York State Electric applied for a license for Project 2438 in 1964. The license for this project, issued on March 5, 1965,

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was made effective from April 1, 1962, the first day of the month in which the Commission issued its *Androscoggin* decision establishing criteria for backdating licenses. Counsel for Niagara Mohawk contends that the—

> * * * lack of rationale in the Commission's demarcation in its *Androscoggin* opinion (1) between projects constructed prior to August 26, 1935 and (2) projects constructed post-1935 with a possible interpolation of a finding as to navigability at any time is illustrated most graphically by the contradictory action of the Commission in the issuance of licenses for [Niagara Mohawk's] Project 2424 and for [New York State Electric's] Project 2438. Each occupies portions of the New York State Barge Canal system. Project 2424 was

> built "in its present form" in 1941. Project 2438, consisting of two separate stations, was built in 1915 and 1917, respectively. The Commisison would retroactively impose administrative charges on Project 2424 from July 1, 1941, but on Project 2438, only from April 1, 1962. This is patently unreasonable and arbitrary discrimination. If a license is required for each project, it was required with equal necessity both at and after June 10, 1920 or at and after August 26, 1935. * * *

In issuing the license for New York State Electric's Project 2438 the Commission stated that it was issuing it in "accordance with the criteria set forth in * * [*Androscoggin*] * *", and therefore "the license herein granted shall have an effective date of April 1, 1962 and a termination date of December 31, 1993." While the Examiner recognizes that he must give due deference to the Commission's conception of the scope of its *Androscoggin* criteria, the Examiner deems it not inappropriate in this instance to indicate for the Commission's reconsideration the fact that the situation it faced in licensing New York Electric's project may have been different from what it thought it was. If an unwitting mistake was made the Commission may want to correct New York State Electric's license. In this connection the answer to Niagara Mohawk's position does not lie in changing the terms of the license for Project 2424 to coincide with those of New York State Electric's Project 2438, but in correcting the terms of the latter if they were granted through error.

For reasons now to be explained, it appears to the Examiner that the type of situation involved in New York State Electric's project is outside any category of unlicensed projects considered by the Commission in *Androscoggin.* In *Androscoggin* the Commission was primarily

concerned with projects located on streams found to be navigable on the basis of their use for the transportation

of logs, as to which the full extent of its jurisdiction had not always been understood. The Commission therefore properly drew a distinction between lawful conduct and unlawful conduct in licensing pre-1935 and post-1935 projects (see *supra,* pp. 7-8).

In view of the fact that the supreme Court determined in 1903 that the New York State Barge canal was a navigable water of the United States, any construction of a project on that waterway after that date, without a federal authorization, can only be regarded as a knowing and wilful violation. That Supreme Court decision was as much, if not more, notice than the amendment of Section 23(b) in 1935, that there could be no lawful construction of projects thereon without a federal permit.

The Examiner submits that for the Commission to retroactively impose administrative charges, etc., on New York State Electric's Project 2438 only after April 1, 1962, disregards the basis on which *Androscoggin* has set the pattern for governing lawful and unlawful conduct. The Examiner therefore recommends to the Commission that, through a show cause proceeding, the Commission retroactively impose administrative charges on that project from the date of the passage of the original Federal Water Power Act, *i.e.,* June 10, 1920. In this connection the Examiner calls attention to the decision *In the Matter of Foreman and Company, Inc.,* 3 SEC 132, 135, in which the Securities and Exchange Commission summarized the applicable law relating to wilful conduct:

> A finding of willfullness need not, of course, be predicated upon the express admission of a registrant that he purposely undertook an illegal course of action. Such a finding may properly rest upon inference drawn from all circumstances surrounding the registrant's conduct, and indeed, must so rest in most cases. *Cf. Pierce* v. *United States,* 252 U.S. 239 (1920); *Marrash* v. *United States,* 168 Fed. 225 (C.C.A. 2d, 1909); *Ryan*

> v. *United States,* 216 Fed. 13 (C.C.A. 7th, 1914); *Commonwealth* v. *Robinson,* 146 Mass. 571, 16 N.E. 452 (1882). Nor is it essential, in order to establish a willful violation within the meaning of Section 15(b), that the proof point to the registrant's having intentionally committed an unlawful act with a 'bad purpose.' While proof of these facts is clearly sufficient to establish 'willfulness' (see *United States* v. *Murdock,* 290 U.S. 389 (1933); *Potter* v. *United States,* 155 U.S. 438 (1894); *State* v. *Morgan,* 136 N.C. 628, 48 S.E. 670

> (1904)), the term embraces a wider category of activities. 'Conduct marked by careless disregard of whether or not one has the right so to act' likewise may be deemed willful. (*United States* v. *Murdock, supra,* at p. 395; see also *Spurr* v. *United States,* 174 U.S. 728, 735 (1899); *Oregon-Washington R. & Nav. Co.* v. *United States,* 205 Fed. 337, 340 (C.A.A. 9th 1913); *State* v. *Savre,* 129 Iowa 122, 105 N.W. 387 (1905)). * * *

In *United States* v. *Illinois Central Railroad Co.,* 303 U.S. 239, 244, the Court also pointed out that "whether respondent knowingly and willfully failed is to be determined by the acts and omissions which characterize its violation of the statute * * *." And in distinguishing between an act declared *malum prohibitum* and an act *malum in se,* the Court in *United States* v. *Union Pacific R. Co.,* 169 F. 65, 67, stated:

> * * * Counsel for defendant contend that the word 'willfully' as employed by the statute necessarily implies an evil purpose or bad motive, and have in their brief collected and reviewed many cases dealing with the meaning of this word. We find no occasion, however, to follow them through this maze of authority. The word is here employed in connection, not with a crime or offense malum in se, but with an offense purely statutory subjecting the offender to a civil action only. In view of our former rulings on this question, we are

of the opinion and so hold that as here employed the word means only the intentional doing of an act forbidden by the statute.

FINDING AND CONCLUSION

Upon consideration of the record made in this proceeding it is found and concluded that Niagara Mohawk's contentions do not warrant any modification of (1) the Commission's orders issuing licenses for Projects 2318, 2320, 2330 and 2424, or (2) the amount of $174,259.05 heretofore billed Niagara Mohawk for annual charge for administration for the periods April 1, 1949-December 31, 1963 (for Project 2318) and November 1, 1949-December 31, 1963 (for Projects 2320 and 2330), the beginning dates for such charges being the retroactive effective dates of the licenses. This is to say, since "there is warrant in the record for the judgment [heretofore exercised by the Commission], it must stand" (*Rochester Telephone Co.* v. *United States,* 307 U.S. 125, 145-46).

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ORDER

WHEREFORE, IT IS ORDERED, subject to review by the Commission:

Within fifteen days after this order becomes the final act of the Commission, Niagara Mohawk shall (1) pay the annual charges assessed in the total amount of $174,259.05, plus interest at the rate of 6 percent "from the dates of the statements of annual charges" as required by the Commission's order issued May 17, 1965, and (2) accept and return to the Commission the license issued on December 9, 1964 for Project 2424.

/s/ FRANCIS L. HALL
FRANCIS L. HALL
Presiding Examiner

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Exceptions to Initial Decision. Received July 29, 1965

NIAGARA MOHAWK POWER CORPORATION
NIAGARA MOHAWK
300 ERIE BOULEVARD WEST
SYRACUSE 2, N.Y.

July 27, 1965

Federal Power Commission
441 G Street, N.W.
Washington, D. C. 20426

Re: Project Nos. 2318, 2320, 2330, 2424—Exceptions to Initial Decision of Presiding Examiner Upon Authority of the Commission to Assign a Retroactive Effective Date to be Used in Fixing Obligations to Pay Annual Charges and to Set Up Amortization Reserves for Constructed Hydroelectric Projects

Gentlemen:

In his Initial Decision the Presiding Examiner, as might well be expected (3-4),[1] decides every issue adversely to Niagara Mohawk since he is undoubtedly bound by Commission precedent and the *Central Maine* case to which he adverts.

The Commission, in its *Androscoggin* opinion, stated:

> "... we have given some weight to the possibility that imposition of such charges might seriously deter potential applicants from coming forward to comply with the statute."

This observation was tied to a July 1, 1958 retroactive cut-off date and thus related to the prospect of charges under Section 10(e) "backdated"

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1 References are to mimeograph pages of Initial Decision.

more than four years. The Commission thus admittedly had reservations about the propriety, even if authorized, of subjecting a licensee to retroactive annual administrative charge payments under Section 10(e) for more than four years prior to license issuance.

In addition to the formal exceptions stated below, Niagara Mohawk respectfully suggests that any practice of back-dating of administrative charges under Section 10(e) thirteen or more years to Niagara Mohawk and any other licensees now or prospectively similarly situated deserves review by the Commission by reason of the Commission's own observation in the *Androscoggin* case. The comprehensive licensing program of Niagara Mohawk, voluntarily undertaken by Niagara Mohawk (Tr. 80-1) is summarized in Niagara Mohawk's letter to the Commission dated July 21, 1965, a copy of which is attached as Exhibit A. Such summary suggests that Niagara Mohawk faces very substantial "backdating" annual administrative charge assessments under Section 10(e) if the Initial Decision to which exception is taken herein should become law.

The untoward extreme of the back-dating practice for imposing retroactive annual administrative charges is fulsomely illustrated by the Presiding Examiner's suggestion (21) that the issued license for Project 2438 be amended *sua sponte* by the Commission to exact 42 years in retroactive administration charge payments instead of the three years specified by the Commission in the license issued March 4, 1965.

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The Presiding Examiner (4, fn. 4) repeats the Supreme Court's statement that "There must be a limit to individual argument in such matters if government is to go on."[2]

The magnitude of the administrative charges to Niagara Mohawk involved here, and as a prospective licensee of other projects, not to mention the situation of similarly situated present and prospective licensees, emboldens Niagara Mohawk to request a complete reconsideration of the Commission's "backdating" policy.

No evidence appears of record that the interests of the United States have been adversely affected by the operation of Project Nos. 2318, 2320, 2330 or 2424 without license under the Act. The termination of these licenses at periods substantially less than the allowable term of 50 years from issuance date puts these projects in a status where the interests of the United States are the same as those of earlier licensed

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projects. Niagara Mohawk has not protested in any of the pending cases the termination date of license as fixed by the Commission.

Conversely, open, notorious, continued and unquestioned use and occupancy of hydro-electric projects for periods dating from prior to June 10, 1920 and August 26, 1935 suggests that the United States, acting through its various

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2 Niagara Mohawk assumes that it was not the intention of the Presiding Examiner to suggest that Niagara Mohawk is foreclosed from pursuing its instant case before the Commission, nor from reviewing, as authorized by statute, any possible adverse decision by the Commission. Niagara Mohawk has open to it review either in the Second or District of Columbia circuits. The Supreme Court has many times granted certiorari where a diversity of decision exists between circuits. Niagara Mohawk believes that the *Central Maine* case is not a correct delineation of the Commission's authority under the Federal Power Act.

departments, acknowledged such condition as completely compatible with the interests of the United States. It is at least inferable that the United States thereby has licensed without burden or restriction such use and occupancy for the respective periods prior to actual license issuance.

Niagara Mohawk excepts the Finding and Conclusion and proposed Order (22-23) and respectfully requests that in lieu thereof the Commission grant Niagara Mohawk the relief sought in its respective applications for rehearing dated August 11, 1964 (Project No. 2318), November 9, 1964 (Project Nos. 2320, 2330) and January 5, 1965 (Project No. 2424).

Exception is taken to finding (9) that Commission "back-dating" authority with respect to annual administrative charges under Section 10(e) and amortization reserves under Section 10(d) springs from Sections 10(g)

and 309 of the Act. "Catch-all" provisions in the Act do not authorize the Commission to create retroactive revenue payment obligations to the general treasury of the United States as an incident of newly commenced supervision by the Commission over a licensed project.

Exception is taken to the finding (13) that the terms of the licenses for Projects 2318, 2320 and 2330 "are intended to, and do, carry to completion the statutory duty of causing Niagara Mohawk to contribute to the costs of administration" retroactively since such licenses by deliberate or unconsidered omission fail to fix a starting date for payment of annual administrative charges in the Article governing such charges as was done in the *Androscoggin* case earlier

and subsequently in the tendered Project No. 2424 license. Hence, the administration charges are by license term necessarily prospective in operation.

Exception is taken to the finding (16) that despite what Part 11.20 of the Commission Regulations say, Niagara Mohawk "must pay its fair share of such costs no matter what the situation is with respect to past reimbursements." Such finding undeniably and clearly indicates that (1) retroactive administration charges are an intended penalty and hence not authorized by statute, (2) are inconsistent with the Commission decision in

Carolina Aluminum Company, 19 FPC 704, 705, fn. 1, and (3) are inconsistent with Part I of the Act in its entirety under which the rights and obligations of a licensee stem only from date of acceptance of license.

Niagara Mohawk respectfully requests that the Commission, in lieu of adopting any or all of the Presiding Examiner's Initial Decision herein, grant by appropriate orders the relief sought by Niagara Mohawk in its above-identified petitions.

Respectfully sumbitted,

NIAGARA MOHAWK POWER CORPORATION
/s/ LAUMAN MARTIN
Vice President and General Counsel

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July 21, 1965

Federal Power Commission
441 G Street, N.W.
Washington, D. C. 20426

Gentlemen:

In your letter of July 13, 1965 in Docket No. IT-5501 you state it to be Commission policy that projects for which license applications under Part I of the Federal Power Act or definite and reasonable schedules for such filing have been received by September 1, 1965 will be considered for licenses having a December 31, 1993 termination date.

Niagara Mohawk, since the Commission's decision in the *Androscoggin* case, has been engaged on a voluntary and extensive project licensing program although it is possible that the Commission has not been fully and formally advised thereof. This letter directs attention to Niagara Mohawk's program.

Niagara Mohawk has accepted licenses for the following hydroelectric developments:

Project No.	Development	River
2047	Stewarts Bridge	Sacandaga
2060	Carry Falls Reservoir	Raquette
2084	South Colton, Five Falls, Rainbow, Blake and Stark	Raquette
2318	E. J. West	Sacandaga
2320	Higley, Colton, Hannawa and Sugar Island	Raquette
2330	Norwood, East Norfolk, Norfolk and Raymondsville	Raquette
Total	16 Developments	

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Niagara Mohawk has filed applications for licenses for the following hydro-electric developments on which action

by the Commission is pending or the corporation has not accepted a license (Hydraulic Race) pending rehearing:

Project No.	Development	River
2424	Hydraulic Race	New York Barge Canal
2474	Fulton, Granby, Minetto, Varrick	Oswego
2482	Spier, Sherman Island, South Glen Falls, Moreau, Bakers Falls and Fort Edward	Hudson
2500	Mechanicville	Hudson
Total	12 Developments	

At this time the Board of Directors of this corporation has approved the preparation and filing of applications for licenses for the following hydro-electric developments:

——	Herrings, Deferiet, Kamargo, Black River, Sewalls Island and Diamond Island (Minor Project)	Black
——	Yaleville (Minor Project)	Raquette
——	School Street	Mohawk
——	Moshier, Eagle, Soft Maple, Effley, Elmer, Taylorville, Belfort and High Falls	Beaver
Total	16 Developments	

In addition, the Board of Directors of Moreau Manufacturing Corporation and Beebee Island Corporation, partly owned subsidiaries of Niagara Mohawk, have approved the preparation and filing of applications for licenses for the following hydro-electric developments. This corporation has been authorized to prepare the applications.

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Project No.	Development	River
——	Feeder Dam	Hudson
——	Beebee Island	Black
Total	2 Developments	
Grand Total	46 Developments	

At this time, our best estimate is that the applications for licenses will be filed with the Commission on or about:

August or September 1965—Beebee Island and School Street

September or October 1965—Herrings, Deferiet, Kamargo, Black River and Sewalls Island

October or November 1965—Feeder Dam

January or February 1966—Moshier, Eagle, Soft Maple, Effley, Elmer, Taylorville, Belfort, High Falls

About mid-year 1966—Yaleville and Diamond Island (Minor Projects)

The preparation of license applications in the form and detail required by Commission rules and regulations requires considerable time and necessarily occasions expense. The foregoing program of Niagara Mohawk represents an attempt to proceed with reasonable expedition within the limits of available manpower.

Will you kindly acknowledge receipt of this letter and 19 conformed copies thereof to the undersigned.

Very truly yours,
/s/ LAUMAN MARTIN
Vice President and
General Counsel

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, David S. Black, and Carl E. Bagge.

Niagara Mohawk Power Corporation) Project Nos. 2318, 2320, 2330, 2424

Opinion No. 481

Opinion and Order on Rehearing Determining Liability for Annual Charges

(Issued November 15, 1965)

BAGGE, Commissioner:

This proceeding is before us on the Niagara Mohawk Power Corporation's (Niagara) application for rehearing of (1) statements of annual charges for three of its existing licensed projects [1] and (2) an order issuing a license for another existing project. [2]

Project No. 2318 is located on the Sacandaga River at Hadley and Conklingville, New York. Project Nos. 2320 and 2330 are located on the Racquette River in St. Lawrence County, New York. Construction work was performed on these projects at various times between 1902 and 1930.

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1 Project Nos. 2318, 2320 and 2330.

2 Project No. 2424. The dates of issuance, effective dates and termination dates of the licenses are as follows:

Project	Date Of Licensing Order	Effective Date	Termination Date
2318	June 25, 1963	April 1, 1949	Dec. 31, 1993
2320	June 12, 1964	Nov. 1, 1949	Dec. 31, 1993
2330	June 15, 1964	Nov. 1, 1949	Dec. 31, 1993
2424	Dec. 9, 1964	July 1, 1941	June 30, 1991

Project No. 2424 was constructed in 1941 at Lockport, New York, on the Erie Canal, which is part of the New York State Barge Canal System. Licenses for Project Nos. 2318, 2320 and 2330, issued in 1963 and 1964, were accepted by Niagara. The license for Project No. 2424, issued in 1964, was not accepted by Niagara.

The Commission issued statements of annual charges for the cost of administering Part I of the Federal Power Act on the three accepted licenses totaling $174,259.05, covering the periods from the effective dates of the licenses through 1963. Niagara applied for rehearing of these statements on August 12 and November 10, 1964. On January 7, 1965, Niagara applied for rehearing of our order issuing license for Project No. 2424. We granted rehearing on all applications and consolidated the proceedings.

1301

Presiding Examiner Francis L. Hall issued an initial decision on July 12, 1965. This decision directed Niagara to pay the annual charges as assessed for Project Nos. 2318, 2320, and 2330, and to accept and return to the Commission the license issued for Project No. 2424. The Examiner also recommended that the Commission impose retroactive administration charges for Project No. 2438 of the New York State Electric and Gas Corporation from the date of passage of the original Federal Water Power Act on June 10, 1920, rather than from April 1, 1962, the first day of the month in which the Commission issued the decision establishing the present criteria for backdating. *Public Service Company of New Hampshire,* 27 FPC 830 (*Androscoggin*). The Examiner considered that the Commission, in imposing annual charges for this project only from 1962, inadvertently departed from the *Androscoggin* criteria. This recommendation is beyond the scope of this proceeding. Furthermore, we consider that backdating the license for Proj-

ect No. 2438 to 1962 was entirely consistent with the *Androscoggin* criteria. This project, like Niagara Mohawk's Project No. 2424, is located on the Erie Canal, which was found navigable in 1903. However, Project No. 2438, unlike Project No. 2424, was built before Section 23(b) was added to the Act in 1935. Since the project was not constructed in violation of this provision, and since there was no finding of navigability after the provision was approved, we believe that the owner qualified to have the license backdated only to April 1, 1962, the first day of the month in which the *Androscoggin* decision was issued. Niagara filed exceptions to the Examiner's decision. The objections of Niagara will be discussed seriatim.

The issues presented here are whether the Commission has authority (1) to backdate a license for a constructed hydroelectric development, (2) to require a licensee to pay retroactive annual administrative charges under subsection 10(e), and (3) to establish amortization reserves under subsection 10(d) of the Federal Power Act on the basis of effective date of the license.

Upon review of the record, the briefs and exceptions, we are of the opinion that the Examiner's findings and conclusions are correct.

Underlying each of the issues in this proceeding is the fundamental question of the scope of Commission discretion under the Federal Power Act. Enacted in 1935, Section 23(b) of the Act provides that it shall be unlawful for any person for the purpose of developing electric power to construct, operate or maintain any dam across any of the navigable waters of the United States except under a license granted pursuant to the Act or a Federal permit granted prior to June 10, 1920.[3] The object of making licenses issued for constructed projects retroactively effec-

[3] 16 U.S.C. 817.

tive is to insure that licensees have the same rights and obligations as they would have had if they had made a timely application for license.

1302

Backdating retroactively imposes certain license obligations. The licensee must pay annual charges for the cost of administering Part I of the Federal Power Act for the past period of the license. In addition, the licensee's net investment in the project is calculated as of the effective date of the license. Amortization reserves from excess profits are also established on the basis of this date.

While the Commission found the rivers navigable in 1949,[4] Niagara did not apply for a license for Projects 2318, 2320 and 2330 until 1962, an interval of thirteen years. The interval was greater in the case of Project 2424 since the determination of navigability had already been made in 1903 when the project was completed in 1941.[5] Application for a license was not made, however, until the end of 1963. However, the Commission treated Niagara as though it had applied for licenses when its obligation became clear by making the license for the first three projects effective in 1949 and making the license for Project 2424 effective in 1941. Had we made the licenses effective in 1962, as Niagara contends, we would be granting Niagara an advantage over those licensees who made timely application for license.

In reaching this result we are fully supported by *Central Maine Power Company* v. *F.P.C.*, 345 F.2d 875 (CA1, May 18, 1965). We also follow the approach used in *Public Service Company of New Hampshire,* 27 FPC 830 (1962),

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4 *New York Power and Light Corp.,* 8 FPC 231 (1949); *Central New York Power Corp.,* 8 FPC 390 (1949).

5 *Robert W. Parsons,* 191 U.S. 17, 27 (1903).

(*Androscoggin*). In *Central Maine, supra,* the company commenced construction in 1937. We made the license retroactively effective as of January 1, 1938. The court held that:

> "In such circumstances in our opinion it is neither discriminatory nor a true penalty for the Commission to treat petitioner in the terms of its license as it would have treated it had it complied with the statute when it should have. It is a familiar principle of equity itself to regard as being done that which should have been done. Any possible discrimination would be the other way. Were petitioner to prevail, parties like Wisconsin Public Service Corp. who had complied with the law would be worse off than those who did not."

In *Androscoggin, supra,* the project had been built and improved before 1935. The dam was replaced in 1958 and 1959. On July 24, 1958, the Commission found that the Androscoggin River is a navigable water of the United States. The company, however, did not make application for a license for its constructed project until December 27, 1960. Taking into consideration the gradual development of the concept of navigability, the failure to apply for a license, and the doubt as to the exact date of construction in 1958, the Commission made the effective date of the license July 1, 1958, the first day of the month in which navigability had been determined.

The Commission made clear that it would be improper to extend the benefits of *Androscoggin* to projects which had been constructed, in whole or in part, after Section 23(b) had been added to the Act in 1935 or to projects operated on waters which had been found navigable after that time. We held that as for projects in the former category, we would make the licenses effective from the date of construction while projects in the latter category would

be granted licenses effective from the date of the finding of navigability. We have dated the licenses for Niagara's four projects accordingly.

Central Maine, supra, refers to broad equitable considerations as support for the Commission's authority to backdate licenses. In addition to these considerations, we conclude that the Federal Power Act is broad enough to encompass this exercise of our discretion. Section 6 makes licenses subject to conditions imposed by the Act and the Commission.[6] Section 10(g) authorized the Commission to impose "such other conditions not inconsistent with the provisions of this Act as the Commission may require."[7] In *Metropolitan Edison Co.* v. *F.P.C.,* 169 F.2d 719 (CA3, 1948), the court held that Section 10(g) gives the Commission "wide latitude and discretion in the performance of its licensing and regulatory functions" and authorizes the Commission to determine the actual legitimate original cost and accrued depreciation applicable to a project as of the effective date of the backdated license. Moreover, Section 309 gives the Commission broad power "to perform any and all acts . . . it may find necessary or appropriate to carry out the provisions of this Act."[8] We accordingly predicate this decision upon our discretionary power which has been explicitly delegated to us under the Act.

Niagara argues that under Section 10(e) the licensee is to pay reasonable annual charges "in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration" of Part I of the Federal Power Act. It objects to being required to pay a share of the costs irrespective of whether the Commission was fully reimbursed in the past. Without a show-

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6 16 U.S.C. 799.

7 16 U.S.C. 803(g).

8 16 U.S.C. 825(h).

(1303)

ing of a deficit, Niagara asserts, the annual charges constitute a penalty unauthorized by the statute. In support of this argument, Niagara cites Section 11.20(a)(1) of the Commission's Regulations under the Federal Power Act which reads: "A determination shall be made for each fiscal year of the costs of administration of Part I of the Federal Power Act chargeable to such licensees . . . . " Niagara contends that there has not been a sufficient showing in support of the charges under the Act and the Regulations.

1304

Section 10(e) of the Federal Power Act does not require that the aggregate annual charges for all licenses exactly equal the Commission's costs for administering Part I of the Act and the Commission has not interpreted the section as so requiring. Between 1938 and 1963 the Commission's regulations provided that annual charges be fixed according to the annual generation and the authorized installed capacity of a licensed project, without reference to the cost of administration. The present regulation (§ 11.20) cited by Niagara did not become effective until January 1, 1964, after the period of the charges assessed in this proceeding (See Order No. 272, 31 FPC 1555), and while that regulation seeks to more closely correlate annual charges and cost of administration, it may not fully achieve this purpose. The reason is that annual charges being paid under licenses issued prior to August 26, 1935, are frequently too low to bear their proportionate share of annual administration costs under the present regulation and the Commission has held that charges under pre-1935 licenses may not be increased under the terms of those licenses. See Order No. 272-A, 31 FPC 1555. We believe that 45 years of administrative interpretation indicates that there need not be a precise correlation between annual charges and administrative costs.

Moreover, the purpose of imposing annual charges from the effective date of a backdated license is not simply to recover administrative costs. It is also to prevent discrimination against licensees who timely complied with the licensing requirements of the Act. *Central Maine Power Co.* v. *F.P.C.*, 345 F.2d 875, 876-877 (1st Cir. 1965); see also *Metropolitan Edison Co.* v. *F.P.C.*, 169 F.2d 719, 724 (3rd Cir. 1948). Even if the former purpose had been fully realized, we would be justified in retroactively imposing annual charges for the latter purpose.

Niagara argues that its licenses for Project Nos. 2318, 2320 and 2330 do not, by their terms, provide for fixing of annual charges for the past period of the licenses. This argument is based upon a distinction in the terms of these licenses from the terms of the licenses issued in *Androscoggin, supra,* and Niagara's Project 2424. The article of the *Androscoggin* license relating to annual charges reads: "Article 18. The Licensee shall pay to the United States the following annual charges, effective as of July 1, 1958 . . ." The parallel provisions of the licenses for Project Nos. 2318, 2320 and 2330 do not provide for an effective date. Niagara contends that this omission indicates an intent to waive the payment of annual charges for the past period of the licenses.

The licenses issued for Projects 2318, 2320 and 2330 do require payment of annual charges for the period before the date of issuance. The licensing order for Project 2318 specifically provides that the license is issued "for a period effective as of April 1, 1949," while the licensing orders for the other two projects provide for an effective date of November 1, 1949. Once the license is effective, the administrative charges and all of the benefits and obligations of the license become operative. Section 11.28 of the Regulations provides that, with certain exceptions, annual charges "shall commence upon the effective date of the license." Here,

the order issuing licenses for Projects 2318, 2320 and 2330 specifically designated effective dates in 1949. No other dates were fixed for the accrual of annual charges. Each license contains an article specifying the method for fixing annual charges. [9] Like other license obligations, the obligation to pay annual charges under this article becomes operative from the effective date of the license. The effective date of the license is not the date the license order becomes final, as suggested by Niagara. Nor is it significant, in view of the wording of the Regulations, that the order in *Androscoggin, supra,* and the order in Project 2424 expressly provided that the annual charges be effective as of the effective date of the license.

With respect to Project 2424, Niagara contends that backdating does not apply to the creation of an amortization reserve pursuant to subsection 10(d) of the Act. We conclude that there is no reason why backdating should not logically apply to Section 10(d) as well as to Section 10(e). *The Commission further finds:*

(1) Upon consideration of the record made in this proceeding, there is no reason to modify the Commission's orders issuing licenses for Project Nos. 2318, 2320, 2330 and 2424 or the amount of $174,259.05 billed Niagara for annual charges for administration for the periods April 1, 1949-December 31, 1963 (for Project 2318) and November 1, 1949-December 31, 1963 (for Projects 2320 and 2330) where the beginning dates for the charges are the effective dates of the licenses.

(2) The assignments of error and grounds for rehearing set forth in the applications for rehearing or the record made herein present no facts or legal principles which would

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9 Project No. 2318: Article 21; Project Nos. 2320 and 2330: Article 29.

warrant any change or modification in the Commission's order issued December 9, 1964, granting a license in Project 2424, or the statements of annual charges applicable to Project Nos. 2318, 2320, and 2330 issued under the Federal Power Act, especially Section 10(e) (16 U.S.C. 803 (e)).

The Commission orders:

(A) The Niagara Mohawk Power Corporation's applications to amend or modify the licenses for Project Nos. 2318, 2320, 2330 and 2424 are denied.

(B) The Niagara Mohawk Power Corporation's applications to cancel or modify the statements of annual charges in the amount of $174,259.05 for Project Nos. 2318, 2320 and 2330, covering the periods from the effective dates of the licenses through 1963, are denied.

(C) The Decision of the Presiding Examiner is adopted as the decision of the Commission except where inconsistent herewith.

(D) Exceptions not granted are denied.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary

BRIEF FOR PETITIONER

In the

United States Court of Appeals

for the District of Columbia Circuit

No. 19887

NIAGARA MOHAWK POWER CORPORATION,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

ON PETITION TO REVIEW ORDER OF
FEDERAL POWER COMMISSION

LAUMAN MARTIN
300 Erie Boulevard West
Syracuse, N. Y. 13202
Attorney for Petitioner

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

Questions Presented

May the Federal Power Commission, in issuing a license for a constructed hydro-electric project under Part I of the Federal Power Act (USCA Title 16 Sections 791a et seq), date the license retroactively so as to (1) impose administrative charges under Section 10 (e) of the Act for years prior to date of actual license issuance, and (2) fix the establishment of amortization reserves under Section 10 (d) of the Act prior to expiration of 20 years following date of actual license issuance?

Do the licenses issued to Petitioner for its Projects 2318, 2320 and 2330 specify retroactive imposition of administrative charges under Section 10(e) of the Act for periods prior to actual date of license issuance?

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TABLE OF CASES

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* Cases chiefly relied upon are marked by asterisks.

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Statutes:

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* Excerpt from Section 23 of the original Federal Water Power Act (41 Stat. 1075)

In the

United States Court of Appeals

for the District of Columbia Circuit

No. 19887

NIAGARA MOHAWK POWER CORPORATION,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

On Petition to Review Order of
Federal Power Commission

BRIEF FOR PETITIONER

Jurisdictional Statement

Petitioner, Niagara Mohawk Power Corporation, seeks review under Section 313(b) of the Federal Power Act of three actions of the Commission assessing administrative charges under Section 10(e) of the Act upon Petitioner's licensed Projects 2318, 2320 and 2330 for periods prior to actual license issuance dates (R. 56, 58, 60) and of an order dated December 9, 1964 (R. 828-36) tendering to Petitioner a license for its Project 2424 insofar as said license order fixes administrative charges under Section 10(e) of the Act and, apparently, the 20 year period in Section 10(d) of the Act, each to commence as of July 1, 1941.

Reconsideration of the three administrative charge assessments and rehearing of the December 9, 1964 license issuance order was requested (R. 879-83, 1053-6, 1109-12), granted and held on a consolidated record before a Hearing Examiner (R. 1-82). Following decision by the Hearing Examiner (R. 1162-84), exceptions by Petitioner thereto (R. 1185-93), the Commission by Opinion 481 (R. 1300-7), issued November 15, 1965 denied Petitioner's reconsideration and rehearing applications.

Petition to review the actions and order was timely filed on January 7, 1966.

Statement of Case

Petitioner, Niagara Mohawk Power Corporation, applied in 1962, received and accepted from the Commission in 1963 and 1964 three licenses for hydro-electric plants, all built and in service prior to August 26, 1935,[1/] designated Projects 2318, 2320 and 2330. These licenses were stated to be effective as of April 1, November 1 and November 1, 1949, respectively (R. 1300).

Petitioner also applied in 1964 for a license for its hydro-electric plant constructed in 1941 and designated Project 2424. By order the Commission tendered a license to be effective as of July 1, 1941 and prescribing specifically that "The licensee shall pay to the United States the following annual charge, effective as of July 1, 1941" as an administrative charge pursuant to Section 10 (e) of the Act (R. 1081).

In the licenses for each of the Projects 2318, 2320 and 2330 the article fixing charges is silent as to effective date,

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[1/] Effective date of amendments to Federal Water Power Act (49 Stat. 838).

providing only that "The Licensee shall pay to the United States the following annual charges:" (R. 736, 834, 862).

Charges aggregating $174,259.05 (R. 1300) have been assessed Petitioner as administrative charges for Projects 2318, 2320 and 2330 for periods 1949-1963 inclusive. Petitioner alleged that the Commission lacked statutory authority to assess and collect these charges for periods prior to actual issuance date of the licenses.

With respect to the tendered license for Project 2424, Petitioner urges again that the Commission lacks authority to impose specifically and retroactively administrative charges under Section 10(e) of the Act and to fix commencement of 20 year period preliminary to establishment of amortization reserves under Section 10(d) of the Act prior to actual license issuance date.

Each of the three licenses accepted and the one sought by Petitioner were voluntarily applied for (R. 80-1) in pursuance of an extensive hydro-electric plant licensing program of Petitioner (R. 1191-3) commenced following the Commission's licensing decision in *Public Service Company of New Hampshire*, 27 FPC 830 (1962).

Petitioner has not questioned the termination dates of 1993 and 1991 for the four projects although the period from actual license issue date to termination is less than the 50 year maximum term allowable under Section 6 of the Act.

Statutes Involved

Attached as Appendix A are excerpts from portions of the Federal Power Act, i.e., Sections 4 (e), 6, 10 (d), 10 (e), 10 (g), 23 (b), 309 and also an excerpt from Section 23 of the original Federal Water Power Act (41 Stat. 1075).

Statement of Points

Point I — The Commission has no statutory authority to assign a retroactive effective date from which to impose annual charges under Section 10 (e) of the Act or for determining application of Section 10 (d) amortization reserve obligation.

Point II — Petitioner's licenses for Projects 2318, 2320 and 2330 do not by their terms prescribe retroactive application of administrative charges.

Summary of Argument

Part I of the Federal Power Act does not permit the Commission in issuing licenses for hydro-electric projects to adopt a retroactive date for imposition of administrative charges under Section 10(e) thereof or to determine application of Section 10(d) amortization reserve obligations. Retroactivity, even where possible, is not favored except upon the clearest mandate.

Section 10(g) of the Act, authorizing the Commission to impose licensing conditions not inconsistent with the provisions of Part I of the Federal Power Act, and Secton 309 prescribing administrative powers of the Commission cannot be construed to permit selective retroactive application only of portions of the statutory obligations incident to operation of a project under license.

Collection of administrative charges for periods prior to actual license date where there has been no administration of the project by the Commission is in fact a penalty, not authorized in an Act in which penalties for non-compliance are carefully spelled out in detail.

Discrimination among licensees is an inevitable result of the evolution of the licensing jurisdiction of the Commission and the Commission's exercise thereof. Discrimination is

not a statutorily authorized or proper ground for retroactive applications.

If it be assumed that administrative charges are subject to retroactive application, Petitioner claims that the language of the licenses for Projects 2318, 2320 and 2330 do not so specify.

ARGUMENT

POINT I

The Commission has no statutory authority to assign a retroactive effective date from which to impose annual charges under Section 10 (e) of the Act or for determining application of Section 10 (d) amortization reserve obligation.

The First Circuit has twice decided the basic question adversely to Petitioner. *Central Maine Power Company* v. *FPC,* 345 F. 2d 875 (1965); *Bangor Hydro-Electric Company* v. *FPC,* 355 F. 2d 13 (1966). These two cases involved construction after August 26, 1935, the effective date of Section 23(b), while this is not true of Projects 2318, 2320 and 2330 although true as to Project 2424. [2/]

Both cases, it is submitted, were decided on the unacceptable premise that the Commission, although not so authorized by statute, has some equity powers. Thus in the *Central Maine* case, the court noted: "It is a familiar principle of equity to regard as being done that which should have been done" (p. 876).

[2/] Section 23 (b), as amended August 26, 1935, indicates a mandatory filing with the Commission for proposed construction of projects on non-navigable waters for a jurisdictional determination of license necessity and makes it "unlawful" to construct a project on navigable waters without license under the Act.

Nowhere in the Federal Power Act, particularly Part I, is there any statement that retroactive licensing of hydroelectric projects, as to any license provisions, is authorized. It is well established that a license is issuable to fully constructed as well as to projects proposed for construction. Such constructed projects might well be lacking any Federal permit or authorization therefor. *Metropolitan Edison Company* v. *FPC*, 169 F. 2d 719, 723 (1948).

Legislation, in the absence of express contrary terms, must be construed as addressed to the future, not to the past. *Union Pacific Railroad Co.* v. *Laramie Stock Yards Co.*, 231 U. S., 190, 199 (1913). "Retroactivity, even where permissible, is not favored except upon the clearest mandate." *Claridge Apartments Co.* v. *Commissioner of Internal Revenue,* 323 U. S. 141, 164 (1944).

The issuance by the Commission and acceptance by applicant of a license under Part I of the Federal Power Act marks the commencement of a series of obligations by licensee and of active continuing administration by the Commission. All of these obligations and, obviously, the administration of its duties over a licensed project by the Commission can commence only from date of actual issuance of the license. For example, important obligations of a licensee are to maintain the project in an adequate condition of repair, to make renewals and replacements, establish and maintain adequate depreciation reserves, to obey rules and regulations which the Commission may prescribe for the protection of life, health and property (Section 10(c)), and to refrain from alteration of or additions to the project unless authorized by the Commission (Section 10(b)). Likewise a licensee must make, keep and preserve records and accounts as directed by the Commission (Section 301(a)). All such actions basic to administrative supervision and direction by the Commission are necessarily pros-

pective. Nothing in the language of the Act sets apart any feature for retroactive application.

Neither Section 10 (g) nor Section 309 of the Act, it is submitted, is to be construed to permit adoption of selectively elected retroactive license provisions. Rather each section permits necessary flexibility for inclusion in license provisions of features necessary to practical administration of the Act but not spelled out in the terms of the Act. Thus in the *Metropolitan Edison* case, *supra,* Section 10 (g) was deemed appropriate to authorize a license provision fixing, as of license date, original cost of the project less accrued depreciation as being initial net investment in the licensed project. To construe Section 10(g), or Section 309 of the Act relating to administrative powers of the Commission, as the touchstone for selective application of retroactive license terms for administrative charges or determination of amortization reserve period is an unwarranted reading into those articles of powers not delegated to the Commission nor necessary to its administration of the Act. The Commission erred in predicating its instant decisions here under review "upon our discretionary power which has been explicitly delegated to us under our Act" (R. 1303) after citing Sections 10(g) and 309.

While the Commission's Opinion 481 does not unequivocally treat with Petitioner's claim that retroactive application of administrative charges under Section 10(e) of the Act is a penalty not specifically authorized by statute, it does quote with favor the *Central Maine* case, *supra,* that no true penalty arises therefrom (R. 1302). Both the Commission and the court in the *Central Maine* case seem to ignore the

careful specification of penalties under the Act,[3]/ none of which involve belated application for a license. Nowhere in the Act is there provision for use of annual charges as a penalty.

The Commission importantly rests its decision not to date the licenses at actual issuance because " . . . we would be granting Niagara an advantage over those licensees who made timely application for license." (R. 1302, also R. 1304).

Given the absence of a statutory power effectively to back date a license, it is inevitable that discrimination as to exaction of annual charges, for example, may be deemed to result. This happens frequently in legislative changes. See *Claridge Apartments* case, *supra*, p. 164.

In attempting allegedly to avoid discrimination among licensees, the Commission is embarked on a doubtful case where impossibility of non-discrimination among licensees with respect to administrative charges and Section 10 (d) amortization reserve computations looms ahead.

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[3]/ See Section 13, 16 U. S. C. § 806 (1958), for failure to complete project construction; Section 17 (b), 16 U. S. C. § 810 for delinquency in payment of annual charges; Sections 18, 16 U. S. C. § 811, (1958), and 316 (b), 16 U. S. C. § 825 (o) (1958), for willful violation of rules and regulations of Secretary of the Army; Section 307 (c), 16 U. S. C. § 825 (f) (1958), for willful failure to testify or produce documents; Section 314 (a), 16 U. S. C. § 825 (m) (1958), for willful violation of the Act, rules, regulations, or orders; Section 315 (a), 16 U. S. C. § 825 (n) (1958), for willful failure to comply with orders, rules, or regulations, or to respond to a subpoena or make an appearance, or to submit information or documents in the course of investigations; and Section 316 (b), 16 U. S. C. § 825 (o) (1958), for willful violations of rules, regulations, restrictions, conditions, or orders of the Commission.

Almost 46 years of experience in the administration of its licensing powers has witnessed notable changes in the defined scope of the Commission's jurisdiction. Only a year ago in *FPC* v. *Union Electric Company,* 381 U. S. 90 (1965), a wholly new predicate for licensing — utilizing the headwaters of a navigable river to generate energy for an interstate power system — was announced. How many projects, some perhaps constructed even prior to June 10, 1920, are now subject to license is a subject for speculation. The Supreme Court has found that such projects require a license. Backdating any feature of such a license will hardly be appealing to a project owner who learns only in 1965 of his new obligation.

The evolution of licensing jurisdiction has progressed so unpredictably that attempted avoidance of discrimination as among licensees can hardly be deemed a ground for exercise of an alleged discretionary power to backdate certain license features.

Even as among existing licensees, the Commission is inconsistent and hence discriminatory in applying formulae for administrative charges. Licenses issued prior to August 26, 1935 are held to be exempt from increases in annual charge rates while those issued subsequent thereto are not so favored. See FPC Order 272-A, 31 FPC 1555.

A revealing weakness of the Commission's backdating philosophy is its treatment of Project 2438, located, like Project 2424, on the Erie Canal. Project 2438 was built before 1920 and never licensed under the Act until 1965. Despite a Supreme Court pronouncement of navigability of the Erie Canal as early as 1903, Project 2438 was licensed as of 1962 while Petitioner's Project 2424 is to be licensed as of July 1, 1941 simply because "there was no finding of navigability after the provision [i.e., Section 23 (b)] was approved." (R. 1301). The Hearing Examiner properly

found that no distinction between the two like situated projects would permit separate licensing treatment (R. 1180-3).

Petitioner submits that the Commission has simply overreached its statutory authority in its varied application of *Public Service Company of New Hampshire,* 27 FPC 830 (1962) which is the subject of reference in 42 FPC Ann. Rep. (1962) p. 24; 43 FPC Ann. Rep. (1963) p. 77; 44 FPC Ann. Rep. (1964) p. 69; 45 FPC Ann. Rep. (1965) p. 62.

All of Petitioner's projects here under consideration were operated continuously either prior to 1935 or from July 1941. Despite the existence of Sections 9 and 10 of the River and Harbor Act of 1899 and the Federal Water Power Act, the four projects were never subjected to inquiry by Federal officials. With the submission by Petitioner to licensing of the projects, the interests of the United States are not adversely affected. Should the United States elect under Section 14 of the Act to effect an acquisition of any or all of the four projects of Petitioner under consideration here, such action is available to it at a time selected by the Commission. Under these circumstances, and in the light of the non-retroactive concepts above referred to, the Commission's retroactive imposition of charges under Section 10 (e) and the retroactive dating for Section 10 (d) constitutes reversible error.

POINT II

Petitioner's licenses for Projects 2318, 2320 and 2330 do not by their terms prescribe retroactive application of administrative charges.

In *Public Service Company of New Hampshire,* 27 FPC 830 (1962), the Commission, in the license article relating to administrative charges, prescribed that such charges be "effective as of July 1, 1958". The parallel provisions of

the licenses for Projects 2318, 2320 and 2330 do not provide for an effective date. Later, the order issuing license for Petitioner's Project 2424 expressly provided that the annual administrative charges therefor be effective as of the specified effective date of the license. From this selective sequence of wording, Petitioner submits that it is reasonable to conclude that the licenses for Projects 2318, 2320 and 2330 do not call for retroactive application of annual administrative charges.

CONCLUSION

The Commission's decisions as exemplified in Opinion 481 should be set aside and vacated to the extent that statements of administrative charges for Projects 2318, 2320 and 2330 attempt to impose such charges prior to actual license date and as to all the projects attempted retroactive applications of Sections 10 (d) and 10 (e) prior to actual license date should be eliminated.

Respectfully submitted,

LAUMAN MARTIN
Attorney for Petitioner,
Niagara Mohawk Power Corporation

Dated: May 31, 1966.

APPENDIX A

Excerpts from Federal Power Act

Sec. 4. The Commission is hereby authorized and empowered —

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project work necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: . . .

Sec. 6. Licenses under this Part shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this Part and calling for the payment of annual charges

shall be deposited with the General Accounting Office, in compliance with section 3743, Revised Statutes, as amended.

Sec. 10. All licenses issued under this Part shall be on the following conditions:

(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reservs shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license.

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: . . .

(g) Such other conditions not inconsistent with the provisions of this Act as the Commission may require.

Excerpts from Federal Power Act

Sec. 23.

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

Excerpt from Section 23 of Federal Water Power Act

That any person, association, corporation, State or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, may, in their discretion file declaration of such intention with the commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act. If the commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

REPLY BRIEF FOR PETITIONER

IN THE

United States Court of Appeals

For The District of Columbia Circuit

No. 19,887

NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION TO REVIEW ORDERS OF
FEDERAL POWER COMMISSION

July 27, 1966.

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TABLE OF CASES:

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REPLY BRIEF FOR PETITIONER NIAGARA MOHAWK POWER CORPORATION

Effective reply to Respondent's brief and reinforcement of Petitioner's claims of error as to the Commission's actions here under review require some consideration of the history of the Federal Water Power Act, amendments thereto,[1/] the Commission's administration of its licensing

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[1/] Section 23(b), with its mandatory filing requirement for jurisdictional determination was added in 1935. The Commission says it "was intended as a concise restatement of a prohibition deemed by the draftsmen to be embodied already in Section 9 of the River and Harbor Act of 1899, when read together with Section 4(d) of the Federal Water Power Act of 1920." (*Public Service Company of New Hampshire*, 27 FPC 830, 832).

authority thereunder, and the response of hydro-electric project owners to the slowly expanded concepts for licensing jurisdiction as exemplified by judicial and Commission interpretation.

The Federal Water Power Act was hailed as legislation effective to encourage hydro-electric development where consent of the United States was required. "The flood of applications which has followed the passage of the act of 1920 and the projects on which, notwithstanding the industrial depression and the uncertain financial situation, construction has already started under license issued by the Federal Power Commission is abundant evidence both of the extent to which former legislation stood in the way of power development, and of the generally satisfactory character of the present legislation." (1 FPC Ann. Rep. (1921) p. 5).

Initially the Commission appears to have given no particular consideration to already constructed hydro-electric projects without license under the then new Act. Section 23, of course, provided for issuance of licenses for those projects already having some form of effective Federal permit upon election to license by the permit holder. Apparently already existing projects otherwise required none since Sections 9 and 10 of the River and Harbor Act barred interference with the interests of the United States in navigable waters or areas affecting navigable water. [2/]

By 1940, however, the desirability of license under the Act was rendered suspect when the Supreme Court assumed that under Section 14 of the Act "riparian rights may pass to

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[2/] The power to exclude structures from navigable waters or to consent thereto "is exercised through section 9 of the Rivers and Harbors Act of 1899 prohibiting construction without Congressional consent and through section 4(e) of the present Power Act." *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424.

the United States for less than their value". *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 427.

Meanwhile the ambit of licensing jurisdiction slowly increased by interpretation, Commission and judicial, of the unchanged statutory licensing provisions. "Loose logging", for example, established navigability. *Wisconsin Public Service Corporation* v. *F. P. C.*, 147 F. 2d 743.

Possible culmination of the ultimate extent of licensing jurisdiction came in *F. P. C.* v. *Union Electric Co.*, 381 U. S. 90, establishing licensing necessity for those projects not on navigable waters or affecting navigability, but "utilizing the headwaters of a navigable river to generate energy for an interstate power system" (p. 95).

While the Commission apparently commenced an investigation of unlicensed projects on December 23, 1937 (Res. Br. fn 9, pp. 11-12), it was not until 1962, after *Public Service Company of New Hampshire*, 27 FPC 830, the so-called "Androscoggin" decision, that the Commission undertook a vigorous program to bring under license some 500 projects (43 FPC Ann. Rep. (1963), p. 79) presumably requiring license under the jurisdictional interpretations promulgated up to that time.

While there has existed "a widespread noncompliance problem with which the Commission had to grapple" (Res. Br. 20),[3]/ understandably, it is submitted, owners of hydroelectric projects were reluctant up to 1962 to submit to licensing.[4]/

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[3]/ The Commission has, through the Attorney General, effective powers for enforcement of the Act. See Section 26 of the Act (16 U.S.C. § 820).

[4]/ Petitioner's projects, the licenses for which are under consideration here, are subject to license because of navigability considerations. No proprietary interest of the United States is involved.

In its *Androscoggin* decision, the Commission properly directed its attention to "a question which has perplexed the Commission for many years, i.e., the appropriate license term to be accorded a project constructed prior to the 1935 amendments to the Act" (p. 832). In such a case, as well as for a project constructed after 1935, the Act (section 6) clearly vests the duration of license term in the Commission so long as it does not exceed 50 years. Petitioner has not quarreled with the Commission's term determinations for its projects (Pet. Br. p. 3).

The Commission, however, after grappling with license term, has erred in asserting power to "back-date" licenses according to a series of standards which in and of themselves promote indefensible discrimination.[5/]

Respondent frankly admits "there is no section of the Act that specifically relates to the effective dates of licenses" (Res. Br. p. 10). Sections 10(g) and 309 of the Act simply do not create retroactive requirements in licensing. In asserting its power to make retroactive imposition of license date, annual charges, and running of pre-amortization reserve period under Section 10(d), Respondent has completely failed to recognize the long accepted canons of statutory construction that legislation, in the absence of express contrary terms, must be addressed to the future, not the past. Further, that retroactivity, even where permissible, is not favored except upon the clearest mandate (Pet. Br. p. 6).[6/] "The words of statutes . . . should be interpreted

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[5/] The anomaly of the Commission's "back-dating" standards discussed below at pages 6-8 itself suggests strongly that "back-dating" *per se* is not authorized by the Act.

[6/] Respondent appears in end result to root its argument for retroactivity solely because it "seeks to avoid placing the violator in a better position than he would have been if he had acted lawfully so far as this is feasible" (Res. Br. pp. 18-19). This reasoning finds no support in the statute.

where possible in their ordinary, everyday senses." *Crane* v. *Commissioner,* 331 U. S. 1, 6; *Malat* v. *Riddell,* 383 U. S. 569, 571.

Petitioner represents that, after licensing under the Act, administration of a licensed project is necessarily prospective in its entirety (Pet. Br. p. 10). Respondent answers only "that some [obligations] are not susceptible to such [retroactive] treatment" (Res. Br. p. 20).

The Commission has thus created substantive requirements through its retroactive applications which are not in the Act expressly or by necessary implication. The First Circuit decisions in *Central Maine Power Co.* v. *F. P. C.,* 345 F. 2d 875, and *Bangor Hydro-Electric Co.* v. *F. P. C.,* 355 F. 2d 13, do not advert to any statutory authority in the Commission to back-date licenses. Respondent admits that in the *Central Maine* case, in treating licensee's argument against imposition of retroactive annual charges, "The Court rejected the contention without even discussing it" (Res. Br. p. 12). The Commission back-dating scheme to prohibit later licensees from being "accorded an advantage over those persons who did obtain licenses" (Res. Br. p. 16) is only an unwarranted attempt to inject something into the Act which simply isn't there. Alleged avoidance of discrimination among licensees is not found in the Act.

The intricate and far-reaching regulation by the Commission of obligations imposed on a licensee under the Act makes it clear that the licensing relationship is necessarily prospective from date of actual issuance of the license and that in the absence of clear statutory authorization to the contrary, the Commission lacks power to impose any retroactive provisions in a license, including particularly those fixing annual charges for administrative costs under Section 10(e) and the running of the pre-amortization reserve period provided in Section 10 (d) of the Act.

Respondent, we submit, misreads *Metropolitan Edison Co.* v. *F. P. C.*, 169 F. 2d 719, as holding that "Section 10(g) authorizes the Commission to act retroactively" (Res. Br. p. 13) and "that the retroactive term under review there met the standard of Section 10(g)" (p. 14). The Court, in *Metropolitan Edison*, only upheld the power of the Commission to fix initial "net investment" for the long constructed project as cost less depreciation at license date. No retroactive term was involved. The determination of "net investment" the Court held, "will serve as the base, throughout the period of regulation, for the establishment, *inter alia*, both of a reasonable rate of return and amortization reserves pursuant to Section 10(d)" (p. 722). This is a far cry from the retroactive requirement implicit in the licenses issued to Petitioner here in fixing a license date long prior to date of actual issuance and thereby requiring all manner of calculations to afford determination of "net investment" as of actual license issuance date.

Respondent adverts to "the Commission's policy of leniency" (Res. Br. p. 18), its "more liberal back-dating policy" (Res. Br. p. 19) and to the Commission's refusal "to ignore more flagrant breaches of statutory duty" (Res. Br. p. 19), all in connection with "back-dating" of licenses.

Respondent adds "the Commission's policy seeks to avoid placing the violator in a better position than he would have been if he had acted lawfully, so far as this is feasible" (Res. Br. pp. 18-19).

The representations above are apparently made in support of the Commission's "back-dating" practices as a means of avoiding discrimination against those licensees subjected earlier in time to the obligations of a license under the Act.

Petitioner submits that "back-dating" injects problems of administration not contained in or contemplated by the Act.

Further, "back-dating", as proposed to be practiced by the Commission, requires arbitrary differentiation between licensees, all of whose licenses have or will arise from single statutory provisions unchanged in substance from adoption of the original Federal Water Power Act in 1920.

The Commission's whole scheme of back-dating, with its selection of "effective date" for license, is predicated on whether or not the *Commission* has made a navigability finding for the stream involved. If so, licenses date from that year — but not earlier than January 1, 1938 (Res. Br. p. 11, fn 9). Absent a Commission finding of navigability, licenses date from April 1, 1962 — except for those projects falling under the rule in *F. P. C.* v. *Union Electric Co.*, supra, where license date is May 1, 1965 (Res. Br. p. 23).

The Commission's license dating scheme leaves fixing license date to the casual happenstance of whether or not the Commission before 1962 made a navigability finding for any particular stream. Such a scheme discriminates against all projects located on Commission navigability-determined streams in favor of those projects located on streams for which the Commission, for whatsoever reason, has made no such determination. For every stream the statutory licensing requirements are the same under the Act.

The Commission scheme appears completely to ignore the applicability of judicial determinations of navigability. While the Commission may be competent to determine navigability and its determinations thereof must be upheld on court review if supported by substantial evidence, it would appear that judicial determinations of navigability are subject to recognition by the Commission, even if such recognition calls for modification of the Commission's present "back-dating" licensing scheme.

The weakness of the Commission's back-dating standards is glaringly apparent in the cases of Petitioner's Project 2424 and New York State Electric & Gas Corporation's Project 2438. The recitals in each license fix navigability of the Erie Canal, on which both projects are located, as having been found by the Supreme Court at least as early as 1903 (R-1078, 33 F. P. C. 413). Yet for Project 2438 the Commission dated the license as of 1962 while that for Project 2424 would be fixed as of 1941. For the Commission to ignore its own recital in Project 2438 and to aver that it "apparently thought, however, that a post-1935 finding of navigability was necessary to bring forcefully home to the project owner who had no occasion to file a declaration of intention that he was in violation of the Act" (Res. Br. p. 22) makes its standards for back-dating suspect, if not ludicrous.

The painful and unsuccessful attempt of Respondent to rationalize its back-dating standards is impressive evidence of the lack of statutory authority so to proceed.

CONCLUSION

Petitioner respectfully submits that the relief sought in its petition for review should be granted.

Respectfully submitted,

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Dated: July 27, 1966.

BRIEF FOR RESPONDENT FEDERAL POWER COMMISSION

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,887

NIAGARA MOHAWK POWER CORPORATION, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT.

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

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July 11, 1966

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

In the opinion of respondent the questions are:

1. Whether the Commission, in licensing a hydroelectric power project that has been operated or maintained in navigable waters of the United States without the requisite Federal authorization, may make the license retroactively effective, so that the licensee has the same obligations, as nearly as practicable, as he would have had if he had obtained a license when he should have.

2. Whether the licenses issued to petitioner for its three pre-1935 projects provide for the payment, from the effective date of license, of annual charges for administrative costs under Section 10(e) of the Federal Power Act.

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TABLE OF CITATIONS

Cases:

* Cases or authorities chiefly relied upon are marked by asterisks.

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BRIEF FOR RESPONDENT FEDERAL POWER COMMISSION

COUNTERSTATEMENT OF THE CASE

Petitioner, Niagara Mohawk Power Corporation, is an electric utility that operates and maintains four hydroelectric projects, three constructed prior to 1935 and one in 1941, on navigable waters of the United States within the State of New York. The Commission is the federal agency charged with licensing the construction, maintenance, and operation of hydroelectric power projects under Part I of the Federal Power Act.[1] In 1935, language was added to

[1] Part I of the Federal Power Act was originally enacted as the Federal Water Power Act of 1920, approved on June 10, 1920 (41 Stat. 1063), and thereafter amended from time to time, principally by Title II of the Public Utility Act of 1935, approved on August 26, 1935 (49 Stat. 838), 16 U.S.C. 791a-825r. Pamphlet copies have been lodged with the Clerk for the Court's convenience.

Section 23 expressly making it unlawful to construct, operate or maintain hydroelectric project works in navigable waters of the United States without either a Federal permit issued before the Act was passed in 1920 or a license issued under the Act.[2] Petitioner complains that the Commission erred by conditioning the licenses to impose annual charge and amortization reserve provisions retroactively.

Petitioner's Project No. 2318, called the E. J. West plant, is located on the Sacandaga River at Hadley and Conklingville, New York, about thirty miles north of Albany. Its Projects Nos. 2320 and 2330, known as the Raquette River projects, are located on the Raquette River in St. Lawrence County in the far northeastern part of the State. These three projects were built without Federal permit at various times between 1902 and 1930. Both rivers, in the reaches where petitioner's three pre-1935 projects are located, were found by the Commission to be navigable waters of the United States in 1949. *New York Power and Light Corp.*, 8 FPC 231; *Central New York Power Corp.*, 8 FPC 390. However, petitioner did not file any applications for licenses for these projects until 1962 (R. 733, 828, 857).

The fourth project, Project No. 2424, named the Hydraulic Race development, was constructed in 1941 on the Erie Canal, a part of the New York State Barge Canal System, at Lockport, near Niagara Falls, in western New York. Although the Erie Canal had been found by the Supreme Court to be a navigable water of the United States in 1903 (*Robert W. Parsons,* 191 U.S. 17, 28), construction of Project No. 2424 was undertaken without applying for a license or even filing a declaration of intention, upon which any question of the Commission's jurisdiction could have been

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[2] Prior to 1935 the necessity for obtaining a license from the Commission depended upon the prohibitions of Sections 9 and 10 of the River and Harbor Act of 1899, 30 Stat. 1121, 1151, 33 U.S.C. 401, 403. See *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377.

determined.[3] Petitioner did not apply for a license until 1962, twenty-one years after that development was begun (R. 1078).

When the Commission issued the licenses for the four developments in 1963 and 1964, it made those for the pre-1935 projects effective from 1949, when the Commission had determined that the waters on which the projects are located are navigable (R. 733-738, 29 FPC 1290; R. 828-835, 31 FPC 1549; R. 857-864, 32 FPC 125). The license for the

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[3] Section 23(b) provides in pertinent part:

> "It shall be unlawful for any person * * * for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States * * * except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person * * * intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States *shall before such construction file declaration of such intention with the Commission*, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person * * * shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, * * * permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws." (Emphasis added.)

Thus, if petitioner, despite the Supreme Court decision, had wished to contend that the Erie Canal was not a navigable water of the United States, it was nonetheless obliged to file a declaration of intention, upon which the Commission would have determined the merits of its argument. Since no declaration was filed, the construction would have been unlawful even if the water had been non-navigable.

Erie Canal project was made effective from 1941, when construction on that project was begun (R. 1078-1082, 32 FPC 1404).

Each of the licenses issued by the Commission to petitioner contains the usual provisions requiring that the licensee pay annual charges under Section 10(e) of the Act for the purpose of reimbursing the United States for the cost of administering Part I and requiring that it establish amortization reserves under Section 10(d) from excess profits earned after the project has been in operation for twenty years.[4] Petitioner's complaint is that those provisions should not have been made retroactively effective.

The license article relating to annual charges for two of these projects (Projects Nos. 2318 and 2320) specifically provides that (R. 736, 834):

> For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, [the Licensee shall pay to the United States] one (1) cent [per horsepower] on the authorized installed capacity * * * plus two and one-half (2½) cents per 1,000

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[4] Section 10(e) provides in pertinent part:

"That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part * * * and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require * * *."

Section 10(d) provides in pertinent part:

"That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license."

> kilowatt-hours of gross energy generated during the calendar year for which the charge is made; or such other amounts as may hereafter be determined as necessary to reimburse the United States for the costs of administration.

The parallel articles of the licenses for the other two (Projects Nos. 2330 and 2424), which were tendered after the Commission's regulations were modified, provide (R. 862, 1081):

> For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, [the Licensee shall pay to the United States] a reasonable annual charge as determined by the Commission in accordance with the provisions of its regulations, in effect from time to time.[5] * * *

The licenses for all four projects contain the following article on amortization reserves (R. 746, 841, 870, 1088):

> After the first twenty (20) years of operation of the project under the license, six (6) percent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings of the project for the establishment and maintenance of amortization reserves, pursuant to Section 10(d) of the Act; one-half of the project surplus earnings, if any, accumulated after the first twenty years of operation under the license, in excess of six (6) percent per annum on the net investment, shall be set aside in a project amortization reserve account as of the end of each fiscal year, provided that, if and to the extent that there is a deficiency of project earnings below six

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[5] During the pre-1964 period involved in this proceeding, the Commission under Section 11.20(a) of the Regulations under the Federal Power Act employed a formula for fixing annual charges for administrative costs which was the same as that contained in the license article for Project Nos. 2318 and 2320. Effective January 1, 1964, the formula was modified.

> (6) percent per annum for any fiscal year or years after the first twenty years of operation under the license, the amount of such deficiency shall be deducted from the amount of any surplus earnings accumulated thereafter until absorbed, and one-half of the remaining surplus earnings, if any, thus cumulatively computed, shall be set aside in the project amortization reserve account; and the amounts thus established in the project amortization reserve account shall be maintained therein until further order of the Commission.

Section 10(d) of the Act provides that these reserves are to be applied, at the Commission's discretion, to reduce the net investment in the project. The net investment, not to exceed the fair value, plus severance damages, is the amount for which the project upon expiration of its license may be taken over by the United States or transferred to a new licensee. See Sections 14 and 15 of the Act.

The licenses for Project Nos. 2318, 2320, and 2330 were accepted by petitioner (R. 759, 1007, 1030) and thereafter the Commission issued statements of annual charges, totaling $174,259, for administrative costs for these projects from the effective dates of the licenses in 1949 through 1963 (R. 878, 1051, 1052). Petitioner then applied for rehearing of these statements (R. 879, 1053). It also applied for rehearing of the order issuing the license for Project No. 2424 (R. 1109). The Commission granted rehearing for purposes of further consideration (R. 1045, 1075, 1118), and the proceedings with respect to all four licenses were consolidated and set for hearing (R. 1126).

On April 20, 1965 (R. 1-82), a pre-hearing conference was held before a hearing examiner. At that time documents related to the contested issues were placed in the record and counsel stipulated that such issues should be disposed of on the record so made (R. 81). The examiner's initial decision issued July 12, 1965, overruled petitioner's contentions (R. 1162). Exceptions having been taken (R.

1185, 1196), the Commission, in large measure affirming the examiner, issued its decision on rehearing on November 15, 1965 (R. 1298-1306), holding that the annual charges for administrative costs had properly been assessed from the effective dates of the licenses and that the amortization reserves provisions had also been properly backdated.

The petition for review under Section 313(b) of the Act followed.

SUMMARY OF ARGUMENT

The Commission has authority under Sections 10(g) and 309 of the Federal Power Act to make a license, and particularly its annual charge and amortization reserve provisions, retroactively effective for a hydroelectric project that has been constructed, operated, or maintained in navigable waters of the United States without the requisite Federal authorization. Section 10(g) broadly empowers the Commission to impose license conditions "not inconsistent with the provisions" of the Act, and Section 309 authorizes it to issue "such orders * * * as it may find necessary or appropriate" to carry out those provisions. The Commission has long exercised the authority to backdate licenses for constructed projects. The First Circuit has recently upheld this authority in two cases.

The Commission's backdating practices are neither punitive nor discriminatory. They impose on the licensee no greater burdens than it would have had if it had timely filed its license applications. By putting the licensee on the same footing, as nearly as practicable, with those who duly complied with the Act, they in fact tend to prevent discrimination. Petitioner's licenses were backdated according to well-known, uniformly applied standards.

Contrary to petitioner's contention, the licenses for all of its projects provide for the payment, from their retroactively effective dates, of annual charges to reimburse the United States for costs of administration of Part I of the Act. The licenses were expressly made subject to the Commission's regulations, and Section 11.28 of the regula-

tions provides that "[a]ll annual charges * * * shall commence upon the effective date of the license unless some other date or dates are fixed in the license."

ARGUMENT

Introduction

Petitioner's principal contention—that the Commission has no authority to backdate the effective date of a license under the Federal Power Act even though the licensee has long been in default in seeking the requisite authorization for the construction, operation, or maintenance of its project—is the same contention that has twice been rejected by the First Circuit. *Central Maine Power Co.* v. *F.P.C.*, 345 F. 2d 875 (CA1, 1965); *Bangor Hydro-Electric Co.* v. *F.P.C.*, 355 F. 2d 13 (CA1, 1966). As we shall show, those decisions correctly upheld the Commission's backdating practice challenged here.

Since its enactment in 1935, Section 23(b) of the Federal Power Act has expressly provided that it is unlawful for any person to construct, operate, or maintain any dam or other project works in any navigable water of the United States without a license issued under the Act or a valid permit issued prior to adoption of the Act in 1920.[6] That section also provides that after 1935 no project could lawfully be constructed in non-navigable waters over which Congress has jurisdiction without the filing of a declaration of intention with the Commission and a determination by the Commission that such construction would not affect the interests of interstate or foreign commerce. Thus, every person intending to construct a hydro-electric project in the United States has been under a clear statutory imperative to go to the Federal Power Commission. Notwithstanding these clear statutory requirements, many hydroelectric projects have been operated or constructed and operated without the requisite authorization.

In issuing licenses for projects that have been unlawfully constructed, maintained, or operated, the Commission

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[6] See note 3, *supra*, p. 3.

has concluded that licenses should generally not be issued for the maximum term of fifty years authorized by Section 6, but rather for a shorter term that takes into account the period of unauthorized operation. Petitioner has not challenged the duration of these licenses which, in accordance with the policy announced in 1962 in the so-called *Androscoggin* case (*Public Service Company of New Hampshire*, 27 FPC 830), expire in 1993 for three projects and 1991 for the other.

In addition, the Commission has concluded that licenses should be backdated for projects, such as petitioner's Erie Canal project, built after 1935 without the filing of a declaration of intention or for pre-1935 projects, such as petitioner's other three projects, maintained or operated without application for a license even after a Commission determination that the river involved was navigable. The object of backdating licenses for projects constructed, operated, or maintained in violation of Section 23(b) of the Power Act is to insure that, consistent with the effective administration of the Act, the licensees have the same obligations, insofar as practicable, as they would have had if they had made timely application for licenses. *Central Maine Power Co.* v. *F.P.C.*, 345 F. 2d 875, 876 (CA1). Backdating results in the retroactive imposition of certain license obligations. As we have seen, annual charges for administrative costs are assessed for the past period of the license, and amortization reserves from excess profits are set up on the basis of the license's effective date. Also, the licensee's original cost of the project is calculated under Section 4(b) of the Act as of this date.[7] By backdating these license ob-

[7] The licenses for petitioner's four projects contain the following article (R. 746, 840-841, 869-870, 1088): "The actual legitimate original cost, estimated where not known, and the accrued depreciation of the project as of the effective date of the license shall be determined by the Commission in accordance with the Act and the rules and regulations of the Commission, and such cost less such accrued depreciation, so determined, shall be the net investment in the project as of such effective date." Petitioner is silent about the article requiring that the net investment in the project be fixed as of the effective date of the license.

ligations the Commission not only secures for the United States that to which it is entitled under the Act, but also prevents undue discrimination against those project owners who have duly observed the law. *Central Maine Power Co.* v. *F.P.C.*, 345 F. 2d 875, 876-877 (CA1). *Cf., Metropolitan Edison Co.* v. *F.P.C.*, 169 F. 2d 719, 724 (CA3).

I. The Commission's long-standing practice of backdating licenses for projects constructed or operated without legal authorization is valid

While there is no section of the Act that specifically relates to the effective dates of licenses, Section 6 makes licenses subject not only to the conditions written into the Act by Congress but also such additional conditions as may be required by the Commission. Section 10(g) specifically authorizes the Commission to attach "such * * * conditions not inconsistent with the provisions of this Act as the Commission may require." And Section 309 gives the Commission the "power to perform any and all acts, and to prescribe * * * such orders * * * as it may find necessary or appropriate to carry out the provisions of this Act."

Petitioner seeks to have this Court read Sections 10(g) and 309 more narrowly than their language permits. The Commission was fully warranted in relying on Section 309 as authorizing such backdating as a measure "necessary *or appropriate* to carry out the provisions of this Act", notwithstanding the fact that backdating is not expressly mentioned in the Act. For this Court, referring to the parallel provision of the Natural Gas Act, said in *P.S.C. of New York* v. *F.P.C.*, 117 AppDC 195, 199, 327 F. 2d 893, 897:

> All authority of the Commission need not be found in explicit language. Section 16 [15 U.S.C. 717o] demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation. While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use

> means which are not in all respects spelled out in detail. * * *

See *Power Authority of the State of New York* v. *F.P.C.*, 339 F. 2d 269, 274 (CA2), certiorari denied, 381 U.S. 933.

And the Commission's power under Section 10(g), which authorizes the Commission to attach license conditions "not inconsistent with the provisions of" the Power Act, has been held to involve a "wide latitude and discretion in the performance of its licensing and regulatory functions." *Metropolitan Edison Co.* v. *F.P.C.*, 169 F. 2d 719, 723 (CA3).[8] More particularly, the Court there said that "Congress must have contemplated the licensing by the Commission of old projects, * * * not under permit, under the provisions of Section 10(g)." *Id.* The Commission, therefore, reasonably concluded that the power delegated to it in these provisions of the Act was broad enough to include the power to backdate licenses for constructed projects.

As we have noted, *supra*, p. 8, the First Circuit upheld the Commission's backdating authority in two recent decisions, both of which involved retroactive license obligations like those involved here. In the first case, *Central Maine Power Co.* v. *F.P.C.*, 345 F. 2d 875, the petitioner had begun construction of its project in 1937 without either a license or a determination by the Commission on a declaration of intention that the interests of interstate or foreign commerce would not be affected. When a license application was filed in 1963, the license was backdated to 1938.[9]

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[8] See also, *F.P.C.* v. *Idaho Power Co.*, 344 U.S. 17, 20 (citing Section 10(g), among other sections, for the proposition that "It is the Commission's judgment on which Congress has placed its reliance for control of licenses"); *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 420-421 (describing Section 10(g) as "the omnibus clause requiring compliance with such other conditions as the Commission may require").

[9] Licenses for projects constructed prior to January 1, 1938, and unlicensed as of that date are made effective as of that date rather than the date of construction. The purpose of this practice is to assure equitable apportionment of the administrative costs relating

On appeal, the petitioner contended, among other things, that the retroactive imposition of annual charges for administrative costs is not authorized by statute. The Court rejected the contention without even discussing it. In the second case, *Bangor Hydro-Electric Co.* v. *F.P.C.*, 355 F. 2d 13, the construction work in violation of Section 23(b) had been undertaken in 1938. The license application was filed in 1963, and the license was backdated to the time of construction. The Court adhered in *Bangor Hydro* to its holding in *Central Maine,* which it restated in the following terms (355 F. 2d 14):

> * * * [T]he Commission was not precluded from antedating a license to the date when a licensee should reasonably have made application or, in the alternative, should have taken note of section 23(b), added to the Federal Power Act in 1935, 16 U.S.C. 817, and filed a declaration of intention * * *.

Petitioner recognizes (Br. p. 5) that *Central Maine* and *Bangor Hydro* decide adversely to it the basic question that it raises here, but argues that those cases "were decided on the unacceptable premise that the Commission, although not so authorized by statute, has some equity powers." But neither case suggests that the Commission's backdating authority is derived from any general equity powers rather than its broad conditioning powers. In *Central Maine,* the court, to be sure, does analogize with approval the backdating policy to the "familiar principle of equity itself to regard as being done that which should have been done." 345 F. 2d at 876. While this equity analogy certainly supports the reasonableness of the Commission's backdating practice and rebuts the claim that backdating is a "penalty," it plainly does not mean that either the Commission backdating, or the judicial approval, looked beyond solid statutory authority for the action. In the present case, the Commission again made it clear that it regards its backdating

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to an investigation of unlicensed projects initiated by the Commission on December 23, 1937. *Public Service Company of New Hampshire,* 27 FPC 830, 834-835.

authority as deriving from the provisions of the Act discussed above (R. 1303).

The *Metropolitan Edison* case [10] further illustrates the scope of the Commission's authority under Section 10(g) of the Act in conditioning licenses for constructed projects. There the Commission issued a license in 1944, backdated to 1938. Among the conditions attached to the license were ones like those involved here—an article requiring the payment of annual charges "starting January 1, 1938, for the purpose of reimbursing the United States for the costs of administration of Part I of the Act,[11] and another requiring the establishment of an amortization reserve after the first twenty years of operation under the license, "namely after December 31, 1957."[12] On appeal, the petitioner did not object to these license terms, though it did object to the term permitting the Commission, in determining the net investment in the project, to take account of depreciation between the beginning of construction (in 1904) and the effective date of the license (in 1938).

The Third Circuit held that Section 3(13) of the Act, defining net investment, did not authorize the Commission to include such depreciation. That section, the Court said, authorizes the Commission to operate only prospectively from the issuance and acceptance of a license. But, it held, Section 10(g) authorizes the Commission to act retroactively. Indeed, according to the Court, one of Congress' primary objectives in enacting the section was to permit the Commission to tailor license conditions for constructed developments (169 F. 2d at 723):

> * * * Congress must * * * have had in mind the fact that there were many projects already in existence, not under permit. We think it was the Congressional

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[10] *Metropolitan Edison Co.* v. *F.P.C.*, 169 F. 2d 719 (CA3), affirming a Commission order issued on November 7, 1944, and amended on November 17, 1947. 6 FPC 189.

[11] The Commission's order setting forth the license terms is not reported.

[12] See 169 F. 2d at 721, note 3.

> intent by the enactment of Section 10(g) to give to the Commission wide latitude and discretion in the performance of its licensing and regulatory functions and that Congress must have contemplated the licensing by the Commission of old projects * * * not under permit, under the provisions of Section 10(g). * * *

The Court held, finally, that the retroactive license term under review there met the standard of Section 10(g), that is, that ~~it~~ was "not inconsistent with the provisions of this Act" (169 F. 2d 723, 724).[13]

In addition to this judicial authority, there is more than twenty years of administrative interpretation to support the Commission's backdating of licenses. Apparently the first case in which annual charges for administrative costs were retroactively imposed was *Bellows Falls Hydro-Electric Corp.*, 3 FPC 699. The license order, issued in 1942, made the charges effective from 1938.[14] In *Metropolitan Edison,* decided in 1947, the Commission provided an explanation of the backdating policy which, as it noted, it had been following for some years. *Metropolitan Edison Co.*, 6 FPC 189. For later orders backdating licenses, see *e.g. Wisconsin Public Service Corp.*, 10 FPC 757 (license issued in 1951; effective from 1938), and *Consolidated Water Power Co.*, 11 FPC 769 (license issued in 1952; effective from 1941).

The Commission, in 1962, in the so-called *Androscoggin*

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[13] Petitioner, in an apparent effort to distinguish *Metropolitan Edison*, reads the case as holding that Section 10(g) "permits necessary flexibility for inclusion in license provisions of features necessary to practical administration of the Act but not spelled out in the terms of the Act" (Pet. Br. 7). Petitioner does not explain, however, why the retroactive license provisions involved there were any more "necessary to practical administration of the Act" than those involved here.

[14] The charges included not only the normal administrative costs computed under Section 11.20(a) of the Regulations under the Federal Power Act, but also costs incurred in investigating the project's jurisdictional status. 3 FPC at 700.

case, *supra*, p. restated its backdating policy and initiated a major program to obtain compliance by owners of constructed projects with the licensing requirements of Section 23(b).[15] Numerous license applications, including petitioner's application for the four projects involved here (Pet. Br. p. 3), were filed in response to *Androscoggin*, and many licenses, again including petitioner's, have been backdated according to the standards there stated.

We will discuss the Commission's implementation of its backdating policy below. But here it is pertinent to note that the Commission's long standing and consistent practice of backdating licenses for projects of the type here involved is entitled to great weight. As Mr. Justice Reed stated in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 314-315:

> * * * [T]he Federal Power Commission's long assertion that it has authority * * * has probably risen to the dignity of an agency "policy." We have often stated our sympathy with established administrative interpretations such as this. *Cf., United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 549. [Footnote omitted.]

See also *Udall* v. *Tallman*, 380 U.S. 1, 16; *Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 408; *Levinson* v. *Spector Motor Service*, 330 U.S. 649, 672-673; *Siegel Co.* v. *F.T.C.*, 327 U.S. 608, 611-613; *Virginia Electric & Power Co.* v. *N.L.R.B.*, 319 U.S. 533, 539-540; *Gray* v. *Powell*, 314 U.S. 402, 411-413; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315.

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[15] Cases such as *Carolina Aluminum Co.*, 19 FPC 704 (1958), are not inconsistent with backdating of licenses for projects of the type here involved because in those cases, relating to pre-1935 projects, there had been no previous Commission determination of navigability or affect on downstream navigability. The policy of those cases to issue 50-year licenses from the date of the Commission's action was changed in *Androscoggin*.

II. The Commission's backdating policy as applied to petitioner is reasonable and consistent with the general policy announced by the Commission

Petitioner's suggestions that the Commission's backdating policy is unreasonable and necessarily discriminatory are without merit.

As we have noted, the Commission's present policy followed here was most fully articulated in the *Androscoggin* case, *Public Service Company of New Hampshire,* 27 FPC 830 (April 25, 1962). That case, as is true with respect to three of the projects here, involved a project constructed prior to 1935. The project had been constructed on the Androscoggin River in 1894, and the dam rebuilt in 1903, 1927-1928 and 1958 (27 FPC at p. 832). Public Service Company of New Hampshire acquired the project in 1943 and applied for license in 1960 after the Commission, in another proceeding involving the Androscoggin River, had found that that river was a navigable water of the United States on the basis of its use for transportation of logs.[16] In passing on Public Service Company's application, the Commision discussed a problem that had "perplexed the Commission for many years, *i.e.,* the appropriate license term to be accorded a project constructed prior to the 1935 amendments to the Act and operated thereafter in navigable waters without requisite federal authorization" (footnote omitted, 27 FPC at 832). That discussion is also applicable to the present issue as to the appropriate date for commencement of license obligations. The Commission identified three principal factors to be taken into account.

(1) The first was that persons who continued to maintain and operate existing projects after the 1935 amendment of Section 23(b) without obtaining a license should not be accorded an advantage over those persons who did obtain licenses (27 FPC at 833):

> * * * If a company whose project has enjoyed three or more decades of unregulated operation were

[16] *New Hampshire Water Resources Board,* 20 FPC 99.

> granted a full 50-year license term from date of issuance, it would reap a substantial windfall from its prolonged delay in filing. Equally important, it would obtain an unmerited advantage over those companies which complied at an earlier date, inasmuch as projects of the latter will be subject to federal recapture well within the next 50 years. To the extent feasible, it is the burden of a sound licensing policy to minimize such inequities.

(2) On the other hand, the Commission recognized that it had been slow to adopt the logging criterion of navigability and that it was not until "[a]t least as early as the 1943 decisions [that] the owner of every project located in a stream capable of being used for the transportation of logs was placed on notice of the perils of further unlicensed operation" (27 FPC at pp. 833-834). The Commission's past failure, for want of sufficient funds or manpower, to enforce general compliance and the large number of projects that had continued to operate without a license since 1935 indicated the need for a discriminating approach if the compliance problem were to be licked. The Commission therefore concluded, realistically, that the notice provided by those decisions was a significant factor and in the light of such notice, it fixed December 31, 1993, *i.e.*, 50 years after 1943, as the termination date of the license in that case (27 FPC at p. 834).

(3) In fixing the effective date of that license (which would control the obligation to pay annual charges and after 20 years the creation of an amortization reserve) at July 1, 1958, when the Commission had first held the Androscoggin to be a navigable water of the United States, the Commission took into account as a third factor the possible effect of backdating the license on the incentive of other owners of unlicensed projects to apply for licenses (*ibid.*):

> In deciding not to impose retrospective charges for the period prior to July 1, 1958, we have given some

> weight to the possibility that imposition of such charges might seriously deter potential applicants from coming forward to comply with the statute. If, however, our experience during the next twelve months indicates that voluntary cooperation will in any event not be forthcoming, we may well wish to reconsider the position we now take on the question of backdating.

But the considerations which support the Commission's policy of leniency with respect to setting the effective date for pre-1935 projects on rivers not previously found navigable are not controlling with respect to projects constructed *after* 1935 or those operated and maintained after Commission determination of navigability. For, as the Commission expressly observed in *Androscoggin* with respect to post-1935 construction (27 FPC at 832, n. 2):

> The construction of any project works *subsequent* to the enactment of Section 23(b) of the Act of 1935 without the concurrent filing of a license application or declaration of intention plainly violates that section. There is little room for dispute that licenses for such projects should be made effective not later than the date of construction of such project works. [Emphasis in orginal.]

On this basis the Commission with respect to petitioner's Erie Canal project, as in *Central Maine* and *Bangor Hydro, supra,* p. 8, concluded that its license should be backdated to the date of construction. For anyone seeking to construct a project after 1935 was plainly required to seek and obtain a license or a Commission finding on its declaration of intention that the project would not affect the interests of interstate or foreign commerce. Unless it did so it could not lawfully proceed with the construction, operation, or maintenance of his project. For those who did, the Commission's policy seeks to avoid placing the violator

in a better position than he would have been in if he had acted lawfully, so far as this is feasible.

With respect to petitioner's three pre-1935 projects here, the Commission applied a more liberal backdating policy, thereby reflecting a regulatory awareness that the owner of a project constructed before 1935 on rivers such as the Sacandaga and Raquette might reasonably have assumed at the time of construction that the Power Act imposed no obligation to seek a license. While all such owners were certainly placed on notice of their obligation to file for a license by 1943, *supra,* p. 17, the Commission in *Androscoggin,* largely to induce voluntary compliance, deemed it desirable not to backdate licenses for pre-1935 construction to the earliest possible date. Instead it announced that where no specific determination of navigability had been made a project would be licensed as of April 1, 1962, the first day of the month in which the *Androscoggin* case was decided. But it concluded that it should not exercise its discretion to ignore more flagrant breaches of statutory duty, such as the failure to file (1) as required for post-1935 construction, or (2) for a license to maintain and operate a pre-1935 project after a Commission determination of navigability had been made for waters on which a project was located. Here, as we have seen, while the Sacandaga and Raquette rivers were found navigable by the Commission in 1949, no license applications were filed until after *Androscoggin.*

Petitioner's contention (Pet. Br. 6-7) that retroactive charges for administrative costs constitute a "penalty" unauthorized by statute is unsound. These charges are not punitive in either intent or effect. To the contrary, with respect to the three pre-1935 projects the amount of the payment is less than it would have been if the license applications had been filed when they should have been. For backdating these licenses only to 1949 plainly relieves petitioner of payments that might have been required in periods even prior to that. In addition, petitioner not only makes no additional payment as a result of its late filing, but it has

not been charged with interest, even though for the past period of the license it has had the use of money that should have been paid to the United States.[17] The First Circuit correctly held in *Central Maine* that backdating licenses for constructed projects involves no "true penalty." 345 F. 2d at 876.

Petitioner further complains that once a license has been backdated the retroactive obligations were "selectively elected" (Pet. Br. 4, 6-7). If the implied argument is that there has been something arbitrary or unreasonable in the license conditions given retroactive effect, the argument is wholly fallacious. Not all the license obligations are, it is true, retroactive. But this simply reflects the fact that some are not susceptible to such treatment (for example, the obligation to maintain the project in good repair). Petitioner makes no claim that the Commission did not retroactively impose all obligations that are susceptible to retroactive effectation. In any event, it is difficult to perceive how petitioner would be injured if the Commission has been less rigorous than it could have been. To the extent petitioner is arguing that it should only be charged future administrative charges, its position is misconceived. For its delay in complying with the law has certainly not lightened the Commission's administrative burden or expense in administering Part I of the Act. Nor has it in any equitable sense entitled petitioner to relief from payment of its share of those expenses. Petitioner's noncompliance with Section 23(b) when it constructed or operated these projects was part of a widespread noncompliance problem with which the Commission had to grapple. The fact that the Commission did not single out petitioner's projects to make a test case does not mean that the administrative costs of the test cases that *were* pressed were not attributable to the entire noncompliance problem, including petitioner's projects. Petitioner ignores this when it argues (Pet. Br. 6-7)

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[17] For the three projects for which annual charges have been assessed, the value of such use, calculated at six percent compounded annually, through 1963 is approximately $89,000, which is about half of the amount of the annual charges.

that the Commission's administrative charges for these projects are necessarily prospective. That argument ignores the fact that neither the statutory provision for annual charges (*supra,* p. 4, n. 4) nor the Commission's formula for determining their amounts, *supra,* pp. 4-5, relates specific costs to specific licensees. Instead, the total administrative expenses have been apportioned each year among all licensees on the basis of the installed capacity, measured in kilowatts, and the output, measured in kilowatt-hours, of the various licensed projects. It is therefore not unusual for a licensee to reimburse the Commission for expenses caused by other licensees in a particular year. It is also not unusual, indeed it is usual, for a particular project to occasion much more administrative expense at one time than at another, so that over the terms of the license temporary variations will tend to wash out. By way of contrast, it is noteworthy that under petitioner's claim, the costs of processing license applications up to the date of issuance of the licensing order should go unreimbursed.

Petitioner also makes the erroneous claim (Pet. Br. 10) that there is no need to backdate the license provisions with respect to the Section 10(d) amortization reserve because the interests of the United States are not adversely affected. To the contrary, the scheme of the Act is that licenses may have 20 years of operation free of federal restrictions against excessive profits resulting from the development and utilization of a part of the nation's water power resources. Here each of the projects will have at least 20 years of such operation. If thereafter excessive profits are earned there is certainly no reason why the cost to the United States, in the event of recapture under Section 14 of the Act, should be greater simply because a project owner failed to comply with the Act for many years.

Petitioner's further contentions (Pet. Br. 10) that *Androscoggin* has received a "varied application" is apparently based on a single decision, *New York State Electric & Gas Corp.,* 33 FPC 413. The Commission there made the license for Project No. 2438 effective from April 1, 1962, the first day of the month in which *Androscoggin* was issued.

That project, like petitioner's Project No. 2424, is located on the Erie Canal, which was judicially held navigable in 1903. However, that project, *unlike* petitioner's, was built before Section 23(b) was added to the Act in 1935. The Commission in the order on rehearing under review here said (R. 1301):

> * * * Since the project was not constructed in violation of this provision, and since there was no finding of navigability after the provision was approved, we believe that the owner qualified to have the license backdated only to April 1, 1962 * * *.

It is not doubted that the license for that project could have been backdated to 1935 (or at least to 1938 (see n. 9, p. 8, *supra*)). The Commission apparently thought, however, that a post-1935 finding of navigability was necessary to bring forcefully home to the project owner who had no occasion to file a declaration of intention that he was in violation of the Act. Accordingly, New York State Electric & Gas Corporation did not have the notice that Commission action would have provided. On the other hand, after 1935, when petitioner constructed its Erie Canal project, the obligation at least to file a declaration of intention was clear.

Finally, it is alleged that under the Commission's backdating policies, "impossibility of non-discrimination among licensees * * * looms ahead" (Pet. Br. 7-8). While the basis of this charge is not altogether clear, it appears to relate to the effective dating of licenses issued under *F.P.C.* v. *Union Electric Co.*, 381 U.S. 90. In that decision, the Supreme Court held that "Congress drew [in Section 23(b) of the Act] upon its full authority under the Commerce Clause, including but not limited to its power over water commerce." *Id.* at 96. A corollary of the holding is that "Congress has required a license for a water power project utilizing the headwaters of a navigable river to generate energy for an interstate power system." *Id.* at 95. Petitioner observes that "[b]ackdating any feature of * * * a license [issued under *Union Electric*] will hardly be appealing to a project owner who learns only in 1965 of his new

obligation'' (Pet. Br. 9). Since the date of petitioner's brief in this proceeding, the Commission has adopted a policy of making licenses issued under *Union Electric* effective from May 1, 1965, the first day of the month in which the Supreme Court decision was handed down. *Central Vermont Public Service Corp.*, Project No. 2487, June 3, 1966; Project No. 2488, June 6, 1966; Project No. 2490, June 6, 1966 (unreported).

III. All of petitioner's licenses provide for retroactive imposition of annual charges for administrative costs

Petitioner argues (Pet. Br. 10-11) that the licenses for its pre-1935 projects do not by their terms provide for the fixing of annual charges for the past period of the licenses. The argument is based on a divergence from the wording of the license issued in *Androscoggin* (and, incidentally, also from the wording for the license for petitioner's Erie Canal project (R. 1081)). The article of the *Androscoggin* license relating to annual charges reads in pertinent part (27 FPC 830, 838):

> *Article 18.* The Licensee shall pay to the United States the following annual charges, effective as of July 1, 1958 * * *.

The parallel provision in the licenses for petitioner's three pre-1935 projects does not include the phrase "effective as of [date]'' (R. 736, 834, 862). Petitioner contends that this difference constitutes a Commission waiver of annual charges for the past period of the license.

But Section 11.28 of the Regulations under the Federal Power Act provides that (18 C.F.R. 11.28):

> All annual charges, except those imposed under section 10(f), shall commence upon the effective date of the license unless some other date or dates are fixed in the license.

No other date for the commencement of annual charges was fixed in these three licenses. They were expressly issued "subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act" (R. 734, 830, 859). Although the Commission cited Section 11.28 and explained its significance in the order on rehearing, petitioner does not even attempt to deal with the point in its brief.

CONCLUSION

For these reasons, the Commission's orders should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

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No. 19,887

NIAGARA MOHAWK POWER CORPORATION,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

PETITION FOR REHEARING

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May 31, 1967.

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TABLE OF CASES

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NIAGARA MOHAWK POWER CORPORATION,
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Respondent

PETITION FOR REHEARING

Application

Petitioner, Niagara Mohawk Power Corporation, seeks rehearing of the decision of this Court dated May 18, 1967, affirming actions of the Federal Power Commission in making retroactive application, in part, of its licensing responsibility under Section 4(e) of the Federal Power Act so as (1) to extract from Petitioner payments for projects licensed, or to be licensed, for administrative charges (§ 10(e) of the Act) for years prior to actual issuance of the licenses, and (2) to start running of the 20 year period prior to impact of "excess earnings" calculations also retroactively (§ 10(d) of the Act).

Petitioner represents that this rehearing application is made in good faith and not for purposes of delay. The sanction of this Court to

retroactive application of portions of the Commission's license function without express statutory authority therefor is contrary to law and it is respectfully submitted that this Court thereby erred in the decision for which a rehearing is sought.

Preliminary Statement

The following excerpts from the Court's opinion concisely point up where Petitioner believes the Court erred:

> "The case presents no question of Congressional power, but only a question of construction of the scope of administrative discretion entrusted to respondent Commission under the Act. The Commission's authority to establish effective dates of licenses earlier than the date of issuance, while not expressly set forth in the Act, is fairly implied, assuming reasonable exercise of the authority, . . . the Act is one that entrusts a broad subject matter to administration by the Commission . . . 1/ in the light of new and evolving problems and doctrines (9).
>
> "The statutory authority to issue certificates or permits on conditions implies broad authority to take effective action to achieve regulation in the public interest (10).
>
> ". . . the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions, including voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives. This source of discretion is available . . . where the agency's order, though having aspects of determination of individual fault is a denial to a wrongdoer

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1/ References are to printed pages of slip opinion.

of participation in a government program . . . for the purpose of maintaining the fairness, equity and efficiency of the program. Here the case is stronger, for petitioner seeks a license or privilege . . . /The license/ certainly need not be extended to an applicant not ready to redress his default by discharging the duty he should by rights have assumed without nudging (11-12).

"The Commission has made a reasonable effort to use a discriminating approach in order to avoid invidious discrimination. . . . nothing presented to us bears a taint of unreasonableness (12).

"This reasonable exercise of administrative authority is not to be gainsaid by maxims that are good enough as generalities but do not undercut the kind of actions under review. . . . the term 'penalty' is hardly appropriate for a condition that puts a wrongdoer in no worse stance than the company that has punctiliously observed the requirements of law . . . (12)."

Further Background on
Evolution of Hydro Licensing

Some further reference to federal statutes governing occupancy of navigable waters or those deemed to affect navigable waters and to the evolution of the Commission's basic licensing jurisdiction is appropriate to the argument sought to be developed below.

Long before enactment of the Federal Water Power Act in 1920, the Rivers and Harbors Act of 1899 provided effective means for protection of the interests of United States navigable waters against encroachment or interference. The two Acts are in pari materia. Each of these two Acts prescribes sanctions and penalties, none of which have been invoked in respect of Petitioner's projects. The Acts contain complete interrelated provisions for protection of the interests of the United States in its navigable waters.

Licensing under the Federal Power Act creates an individual relationship between the United States and the owner of the licensed project with burdens and obligations spelled out in detail through the license instrument, the Act and valid rules and regulations issued by the Commission under the Act. Because the licensing scheme is spelled out in such detail, any enlargement of licensing conditions by administrative fiat is suspect.

> "The license is a contract between the Government and the licensee, expressly contains all the conditions which the licensee must fulfill, and except for breach of conditions, can not be altered during its term either by the Executive or by Congress without the consent of the licensee" (1 FPC Ann. Rep. (1921) 50).

Unfortunately this concept was torpedoed when the power of the Commission (as legislative agent of the Congress) to eradicate a license provision was upheld (Niagara Falls Power Co. v. Federal Power Commission, 137 F.2d 787 (1943) cert. denied 320 U.S. 792, 815).

While a license may be deemed a privilege, the ultimate surrender of licensed property may be made at less than its value (United States v. Appalachian Power Co., 311 U.S. 377, 424 (1940)).

The ambit of licensing jurisdiction has been steadily extended until it now encompasses (first enunciated 45 years after adoption of the Act) projects which have no occupancy of or effect upon navigable waters at all (Federal Power Commission v. Union Electric Co., 381 U.S. 90 (1965)).

Each of Petitioner's licenses here under consideration were voluntarily applied for (R. 80-1).

Against the background of the evolution of the Commission's licensing jurisdiction, it is at least understandable that prior to the Commission's Androscoggin decision, licenses were not generally sought "without nudging". In fact, to suggest that failure of the Commission to pursue aggressively a policy to reduce to license already constructed projects "for want of funds or manpower"[2/] is to impute to Congress a will to sabotage enforcement of its own legislation.

Because application for the licenses was not made at some earlier undefined time, Petitioner, however, is deemed by the Court a "wrongdoer"[3/] and in any event one required to "redress his default"[4/] and subjected to required payments under authority only inferred for "the privilege of continuing to utilize a river subject to the jurisdiction of Congress".[5/]

The interests of the United States in its navigable waters were apparently not adversely affected prior to filing of license applications by Petitioner. Those interests are certainly and undeniably safeguarded once license issues and no need for assessment for administrative charges not actually experienced appears.

2/ Slip opinion, p. 6.
3/ Slip opinion, pp. 11, 12.
4/ Slip opinion, p. 12.
5/ Slip opinion, p. 12.

I.

The Commission Actions Under Review Present a Question of Statutory Power, Not Exercise of Administrative Discretion and the Court Erred in Bottoming Its Decision on Allowable Administrative Discretion.

Petitioner respectfully submits that the Court erred in holding that only the scope of the Commission's administrative discretion under the Act was involved in its retrospective actions reviewed by this Court. Had the Congress intended to embody retroactively applied administrative charges as a condition of issuance of a license for a constructed project, it is reasonable to assume that Congress would so have prescribed in unmistakable language.

Accordingly, Petitioner respectfully submits the Court erred in sanctioning such retroactive imposition of license administration charges as a condition of a license where the full purpose is apparently only to put Petitioner "in no worse stance than the company that has punctiliously observed the requirements of law" and as a measure to equalize Petitioner's situation with that of other licensees.

Whatever it may be called - condition or penalty - authority for the exaction is not found in the Act which abounds with both enforcement and penalty provisions as does the related Rivers and Harbors Act.

In Claridge Apartments Co. v. Commissioner, 323 U.S. 161, 164, discrimination is deemed "consistent with the normal consequences of

legislation in the drawing of a line between the past or the present and the future".

Each license issued under the Federal Power Act, whether contract or not, establishes an individual relationship of licensee with the United States. To affirm retroactive application of charges, not clearly authorized by statute, simply to equalize burdens among licensees seems clearly beyond the pale of administrative discretion.

Petitioner's projects did not contribute to the cost of administration of the Act until the license process was commenced. To find that administrative charges under Section 10(e) of the Act are assessable to Petitioner's projects for years prior to actual license issuance constitutes a finding not supported in fact. To say such charges are imposable as a prior condition for license issuance for one "not ready to redress his default" is necessarily in practical effect the addition of a penalty not specified in the Act.

Petitioner respectfully requests that the Court reconsider its action in enlarging the scope of administrative discretion by the Commission and upon reconsideration, find that the Act contains no authorization for retroactive imposition of administrative charges.

II.

<u>The Commission Did Not, In Fact, Assume Reasonable Exercise of Authority In Retrospective Application of Licensing Standards, - Assuming Such Authority To Exist.</u>

Petitioner in its Reply Brief, pages 6-8, pointed out what appeared to be almost incomprehensible vagaries in the Commission's "back-dating" practices as evolved to date. Petitioner's argument there seems not to have impressed the Court else the Court would not have said ". . . nothing presented to us bears a taint of unreasonableness".[6/]

It appears to Petitioner, however, that issuance of a license dated as of 1962 to a pre-1920 project of another licensee (33 FPC 413) on the same stream as Petitioner's Project 2424,where the tendered license is as of 1941, is a patent illustration of "invidious discrimination". That such discrimination may exist indicates the inherent weakness, separate and apart from lack of statutory authority, in the license "back-dating" of the Commission.

Conclusion

Petitioner respectfully requests that it be granted rehearing of the Court's decision of May 18, 1967 and that upon rehearing, the Court grant Petitioner the relief sought in its petition for review in the above-numbered proceeding.

Respectfully submitted,

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Dated, May 31, 1967.

6/ Slip opinion, p. 12.